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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

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No.

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HE CLEVELAND ELECTRIC ILLUMINATING COMPANY; THE NORTH AMERICAN COAL CORPORATION; OHIO COAL ASSOCIATION, *Appellants,*

v.

NITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., *Appellees.*

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**Appeal from the United States District Court for the Northern District of Ohio**

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## STATEMENT AS TO JURISDICTION

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The Cleveland Electric Illuminating Company, The orth American Coal Corporation and Ohio Coal ssociation, appellants, submit this statement to show at the Supreme Court of the United States has juris- ction of this appeal and that substantial questions e presented.

## OPINION BELOW

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, filed December 17, 1956, is reported at 147 F. Supp. 622, and is appended hereto as Appendix A. That Court entered no findings of fact or conclusions of law apart from its opinion.

The report of the Interstate Commerce Commission, which is reported at 298 I.C.C. 85, is appended hereto as Appendix B. The Commission's order is appended hereto as Appendix C.

## JURISDICTION

This suit was brought under 28 U.S.C. Section 1336 to set aside an order of the Interstate Commerce Commission. The judgment of the three-judge District Court, dismissing the complaint, was entered on December 27, 1956. Notice of appeal was filed in that court on February 23, 1957. Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Sections 1253 and 2101 (b). Such jurisdiction is sustained by a large number of cases, including the following: *North Carolina* v. *United States,* 325 U.S. 507 (1945); *Youngstown Sheet & Tube Company* v. *United States,* 295 U.S. 476 (1935); *Ayrshire Collieries Corporation* v. *United States,* 335 U.S. 573 (1949).

## STATUTES INVOLVED

Sections 13(3)(4), 15(1) and 15a(2) of the Interstate Commerce Act, as amended (49 U.S.C. sections 13(3)(4), 15(1) and 15a(2)), are set forth in full in Appendix D hereto.

## QUESTIONS PRESENTED

The order of the Interstate Commerce Commission here assailed was entered in a proceeding under section 13(3)(4) of the Interstate Commerce Act in which the Commission found that intrastate rates on coal, which had been voluntarily reduced to meet truck competition from origin districts in Ohio to destinations in northeastern Ohio without corresponding reductions from the longer-haul interstate origin districts from whence there was no truck competition, caused undue preference and prejudice as between persons and localities in intrastate commerce on the one hand and in interstate commerce on the other. That ultimate conclusion was premised on the finding that the truck competition from the intrastate origin districts is not of sufficient severity to warrant difference in treatment between the intrastate and the interstate rates in response to such truck competition. The principal questions involved in this appeal are:

I. Whether that finding of the Commission with respect to truck competition is supported by essential findings based on substantial evidence.

II. Whether the Commission, in making that finding with respect to truck competition, could rationally give consideration only to existing and past truck competition and could disregard or treat as legally irrelevant evidence as to imminent large scale diversions to truck service if the intrastate rates were not reduced.

III. Whether, if the previously existing differences between the intrastate and interstate rates must be restored under a finding of preference and prejudice, the Commission has power to order a reduction in the interstate rates, or whether, under section 13(4) of the Interstate Commerce Act, the Commission's

power is limited to ordering an increase in the intrastate rates.

IV. Whether the Commission's findings disclose that the Commission has complied with the rule of this Court in *United States* v. *Illinois Central*, 263 U.S. 515, 524, that a difference in rates cannot be held to be illegal, because unduly preferential and prejudicial, unless it is shown that such difference "is not justified by the cost of the respective services, by their values, or by other transportation conditions."

## STATEMENT

In June, 1954, the railroads operating in Ohio, in order to meet truck competition on bituminous coal from nearby mines in Ohio to the Cleveland area,* voluntarily filed, with the Public Utilities Commission of Ohio and the Interstate Commerce Commission, tariffs containing reductions of 44 cents per ton in the rates on bituminous coal from certain origin districts in Ohio, northern West Virginia and western Pennsylvania to the Cleveland area. After the filing of these tariffs the railroads sought special permission from both commissions to postpone the effective date of the tariffs pending further study. This was denied by the Ohio Commission as to the intrastate rates and they became effective as published on August 2, 1954. The Interstate Commerce Commission allowed postponement as to the proposed 44-cent reductions in interstate rates and those reductions never became effective.

After the reduced intrastate rates became effective, the New York, Chicago, and St. Louis Railroad Company, hereinafter called the Nickel Plate Railroad,

* Cleveland, Avon Lake, Willoughby (Eastlake) and intermediate points.

refused to file a new tariff to increase the rates voluntarily, as desired by the other railroads. Thereupon the railroads, other than the Nickel Plate, hereinafter referred to as the railroads, elected to continue in effect their reduced truck-competitive intrastate rates. This had the effect of making the differences between the intrastate and interstate rates 44 cents a ton greater than the differences which were in effect on August 1, 1954.

The railroads then brought the matter to the attention of the Interstate Commerce Commission on allegations that such intrastate rates violated an outstanding order of the Commission.* That Commission thereupon reopened the proceeding in which that order was entered and instituted the section 13 proceeding in which it issued the assailed order. After hearing, it was found that the reduced intrastate rates did not violate the order and that issue is no longer present.

The appellants, who participated in the Commission proceeding in opposition to an order requiring increases in intrastate rates are: The Cleveland Electric Illuminating Company, hereinafter called the Illuminating Company, the North American Coal Corporation and Ohio Coal Association, which are receivers and shippers of coal on the rates involved.

The principal origin districts in Ohio which are involved here are the Middle and Leetonia Districts, which are located in eastern Ohio, nearest to the desti-

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* The order referred to was entered by the Interstate Commerce Commission on May 2, 1933 in Docket No. 25566, *Intrastate Rates on Bituminous Coal Within the State of Ohio,* 192 I.C.C. 413. That order prescribed from and to the points involved in the instant case, and others, certain minimum intrastate rates on bituminous coal. Those minimum rates were much lower in dollars and cents than those here involved.

nation area (an average of 80 miles via highway therefrom) and the Ohio No. 8 district which lies somewhat south of the Middle and Leetonia districts. The districts outside Ohio which ship coal to the Cleveland area which are most significant in this proceeding are the more distant Moundsville and Fairmont districts in northern West Virginia and the Butler-Mercer and Raymilton Districts in western Pennsylvania.

In an effort to effectuate savings in transportation costs, the Illuminating Company began in 1950 to truck substantial tonnages of coal. If the railroads had not made the 44-cent reduction on August 2, 1954, it planned to extend those truck movements to the extent of a million tons in the first year the plan became operative, with increasing amounts of trucking in later years.

The railroads, who had been kept informed of these developments, then took steps to hold this traffic to rail service. In April, 1954, they reduced the interstate rate from Raymilton, Pa., to Ashtabula, a distance of about 80 miles, from $2.67 to $2.36 per ton. That reduction, which is still in effect but not in issue here, held practically all the coal used in the Ashtabula plant (Ceico) to rail service. The next step was publication of the intrastate reductions which are in issue here.

In the hearings before the Commission one of the principal contentions of appellants was that the substantial actual and potential truck competition, which was not present from the interstate origin districts, warranted a difference in treatment of the rates as between those intrastate and interstate districts. Ap-

pellants also showed that the railroads by increasing the intrastate rates to the August 1, 1954, level would suffer a great loss in revenue than by retaining them on the reduced basis.

Various interstate shippers intervened, showing how the trucking from the Ohio districts was also having an adverse effect on their shipments to the Cleveland area. They pointed to the commercial need for an extension of the 44-cent reduction to interstate districts shipping steam coal to the Cleveland area so as to permit them, as well as the intrastate districts, to compete with the intrastate trucking and they urged the Commission to reduce the interstate rates accordingly.

On the question of truck competition and the effect on railroad revenues of increasing the reduced intrastate rates to their former level, the hearing examiner, in his proposed report, which was attached as Exhibit C to the complaint of the Illuminating Company, came to the following conclusion (italics supplied):

> There is keen competition in the sale of steam coal in the Cleveland area between the Ohio districts from which the reduced rates apply and the Fairmont, Moundsville and Butler-Mercer districts. In the last several years most of this coal has been supplied by the Ohio No. 8 and the Fairmont districts. *There is substantial actual and potential truck competition from the Middle and Leetonia districts to the Cleveland area,* but the record clearly indicates the lack of such competition from the Ohio No. 8, Cambridge, and Crooksville districts. The shippers in the Ohio No. 8 district urge, however, that they are as much affected by the truck competition as are the shippers in the Middle-Leetonia districts, but their situation in this respect is not different from

the shippers in the Fairmont, Moundsville and Butler-Mercer districts. *In fact, it appears that the latter shippers are more seriously affected by the truck competition* as their rates generally are higher than the prior rates from the Ohio districts.

The reduced rates from the Ohio districts to the Cleveland area are the result of the voluntary action of the respondents. They were published after lengthy consideration by responsible traffic officials of the carriers, none of whom testified in this reopened proceeding except the traffic vice president of the Nickel Plate. The reduced rates apply only on steam coal and if rate reductions are confined to that type of coal, *there is no sound basis for assuming that they will spread to the extent indicated by the petitioners. The record shows that the reduced rates are compensatory and are not below a minimum reasonable level, and, in the opinion of the examiner, the carriers would suffer a greater loss in revenue by an increase in such rates to the level which existed on August 1, 1954 than by retaining the reductions.* It follows, therefore, that the reduced intrastate rates do not create undue or unreasonable discrimination against interstate commerce.

The examiner recommended that the Commission find (1) that it had not been shown that the intrastate rates caused unjust revenue discrimination against interstate commerce, and (2) that the intrastate rates from origins in the Ohio No. 8, Cambridge and Crooksville districts, but not from the Middle and Leetonia districts, caused undue preference of said origins and shippers and undue prejudice to origins and shippers in the Fairmont, Moundsville and Butler-Mercer districts, which should be removed by re-establishing the differentials and relationships between those districts

which existed on August 1, 1954. Under such a finding, the railroads would have had the alternative of reducing the interstate rates or of increasing the intrastate rates from the Ohio districts, other than the Middle and Leetonia districts.

In its report, the Commission adopted, except for minor and unimportant editorial changes in wording, the summary of evidence relating to truck competition and subsidiary findings in respect thereto contained in the report of the examiner. On the basis of that evidence and those subsidiary findings, the Commission found as follows (App. B, 298 I.C.C. 109)*:

> There is no truck competition from the interstate districts or the Ohio No. 8, Cambridge and Crooksville districts to the Cleveland area. There *is* some truck competition from the Middle and Leetonia districts, but it is indicated that it is not of sufficient severity to warrant different treatment of the rates from those districts and the rates from the other districts. (Italics supplied)

The Commission thereupon concluded that the rates in question resulted in undue preference and prejudice as between persons and localities in intrastate and interstate commerce and unjust discrimination against interstate commerce and ordered the railroads to cure such discrimination, preference and prejudice by increasing the intrastate rates to the August 1, 1954, level.

The Commission further held that it had no power under section 13(4) of the Act to restore the differ-

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* The Commission's report in Appendix B is reproduced photographically and the page numbers correspond to those in the official reports of the Commission.

ences in effect on August 1, 1954, by requiring a reduction in the interstate rates rather than by increasing the intrastate rates.

In the case brought by the appellants in the District Court, that court held that the Commission's order was justified by its conclusion that the intrastate rates caused undue preference and prejudice as between persons and localities in intrastate and interstate commerce and that such conclusion was supported by subsidiary findings of fact which were supported by substantial evidence. In view of that finding, the District Court stated that it was not necessary to determine whether the order was also supported by the Commission's conclusion that the intrastate rates caused unjust discrimination against interstate commerce, although the Court noted in that connection that "close and interesting questions" were presented.

The District Court also declined to rule on appellants' contention that the Commission erred in holding that it had no power, under its finding of undue preference and prejudice, to order reductions in the interstate rates.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The problem in this case, as distinct from the usual case arising under section 13(4) of the Interstate Commerce Act, arises from the fact that on the shorter intrastate movements there is actual truck competition which has already resulted in diverting coal traffic from rail movement. Furthermore, there is imminent a substantial increase in the truck competition which will tend to divert even larger tonnages of coal from rail to truck movement unless truck-competitive rates are maintained. The injury to the interstate movement

will be just as great whether or not the intrastate rail rates are increased to the August 1, 1954, level.

In those circumstances the carriers serving the Ohio mines are justified in the exercise of their managerial judgment in protecting themselves against the loss of this traffic. This is particularly true when the interstate carriers can, if they wish, adopt the same protective measures for their interstate traffic. The proper remedy in this situation, if the historical relationships between the intrastate and the interstate rates must be maintained for competitive reasons, is for the interstate rates to be reduced so as to conform to the intrastate truck competitive level rather than for both to be maintained on a level at which substantial rail traffic will be lost to trucks.

In *Mississippi Public Service Commission* v. *United States,* 124 F. Supp. 809, 816 (S.D. Miss.) aff'd. 349 U.S. 908 (1954), the Court invalidated a Commission order under section 13 on the ground that it disregarded testimony by shippers that they would use trucks rather than pay the increased rail rates, and that the net result would be that the income of the railroads would be reduced rather than increased. Compare *Florida* v. *United States,* 282 U.S. 194, 214-215 (1930).*

In the instant case the Commission's underlying findings show that the problem is similar to that in

* This Court pointed out that the Commission had made no finding as to whether "the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues * * *" and noted that "The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage." (282 U.S. at 214-215).

the *Mississippi Public Service* case. The ultimate findings and conclusions—that the truck competition on the short hauls is not a differentiating factor justifying the reduced intrastate rates—are without support in the factual findings or the evidence.

In addition, here the Commission found that it lacked the power in this proceeding to reduce the interstate rates to bring about the relation between the intrastate and interstate rates found necessary for competitive reasons. Whether the Commission possesses such authority in cases arising under section 13(4) raises an important and substantial question of law which should be decided by this Court.

These questions are of general importance to the railroads, to shippers, and to the Interstate Commerce Commission in its administration of the Interstate Commerce Act, and should be resolved by this Court.

**QUESTION NO. I**

The Commission's subsidiary findings furnish no basis for its conclusion that the truck competition here shown by the evidence did not justify the reduced intrastate rates.

The Commission and the courts recognize that a difference in carrier competition encountered is a differentiating circumstance in rate making so as to make lawful, rate relations which might otherwise be declared unlawful as causing preference and prejudice. *East St. Louis Cotton Oil Co.* v. *Baltimore & O. R. Co.*, 243 I.C.C. 43, 46, (1940); *L. T. Barringer & Co.* v. *United States*, 319 U.S. 1, 14 (1943). Intrastate rates may properly be reduced to meet competitive carrier rates if revenues thereby secured are greater than if

the rates were not reduced and the traffic diverted. *Florida* v. *United States,* 282 U.S. 194, 212, 214-215 (1931); *Virginia Intrastate Coal Rates,* 287 I.C.C. 245 (1952); *Mississippi Public Service Commission* v. *United States,* 124 F. Supp. 809, affirmed 349 U.S. 908 (1954). This principle requires that the assailed order be set aside unless the Commission's report provides a rational, reasonable basis for finding that truck competition is not a differentiating circumstance in the making of the rates involved.

The Examiner based his conclusion that "there is substantial actual and potential truck competition from the Middle and Leetonia districts", on a recital of evidentiary facts, and subordinate findings relating thereto, all of which were taken over verbatim into the Commission's findings. Furthermore, the Commission neither recited any evidentiary fact nor made any subordinate finding with reference to the facts which it did recite, contrary to those in the proposed report of the Examiner. The Commission's report differs from that of the Examiner on the question of truck competition *only* with respect to the ultimate conclusion of whether the truck competition from the Middle and Leetonia Districts is of such character as to warrant competitive reductions therefrom, with no corresponding reductions from origin districts not subject to truck competition.

In the numbered paragraphs to follow are summarized from the report of the Commission, with references to the pages thereof as found in 298 I.C.C. and reproduced in Appendix B hereto, the Commission's subordinate findings which relate to the matter of truck competition. This is done because appellants believe that the credibility of the witnesses on the

matter of truck competition is important (Cf. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474 (1951)) and because the significance of the recited facts is so clear that the only conclusion they could possibly support is that which was drawn by the examiner.

1. Prior to 1950 the Illuminating Company received all of its coal requirements by rail. In that year it commenced using trucks to transport coal from Raymilton, Pa., to its Ceico plant at Ashtabula, a distance of about 82 miles. The truck shipments aggregated 29,951 tons in 1950, 77,769 tons in 1951, 113,912 tons in 1952, and 144,924 tons in 1953. It also received 118,049 tons of coal by truck at its Eastlake plant at Willoughby in 1953, some of which originated in the Leetonia and Middle districts of Ohio. (pp. 87-88) The Illuminating Company received by truck 144,924 tons of coal at Ceico and 118,049 tons at Eastlake in 1953. Trucks were used for transportation of 42,115 tons to Ceico in the first 4 months of 1954 and 63,892 tons to Eastlake in the first 6 months of that year. (p. 96)

2. For some time the Illuminating Company had discussed with railroad officials the question of reductions of rail rates on coal to meet truck competition. Shortly after a meeting in December 1953, a reduction of 31 cents to a rate of $2.36 was proposed from Raymilton to the Ceico plant at Ashtabula. That reduction became effective on April 23, 1954* After the rates were reduced from Raymilton, and while the reduced rates were in effect within Ohio, the truck tonnage diminished considerably. (p. 96)

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* This truck competitive interstate rate is not in issue in the instant case and is still in effect.

3. A survey made by the Nickel Plate showed that in the first eleven months of 1954 the trucks transported 310,445 tons to the Cleveland area involved in the case. The Nickel Plate's principal reason for opposing an increase in the intrastate rates to the August 1, 1954, level was to prevent a further diversion of the traffic to the trucks. (pp. 94-95)

4. If the Ohio rates are increased to their former level and the reduction from Raymilton is removed, the Illuminating Company expects to use trucks for the transportation of about a million tons of coal in the first year. This first year would be regarded as a transitional period, after which the truck tonnage might be expected to increase. (p. 96) It had several studies made with respect to the costs of truck transportation. (p. 97)

5. The Commission found that the truck charges made by the coal companies which supplied the coal could not be accepted as a reliable guide as to the cost of transporting coal by truck. (p. 97) Furthermore, the Commission indicated that little weight could be accorded certain cost studies made by an equipment manufacturer which included no profit item. (pp. 97-98) At page 98 the Commission said:

> One cost study, and perhaps the most significant, was made by a large trucking company of the type which might be employed by the Illuminating Company to haul its coal. It shows costs, including items for management, administration, and profit, of $1.82 a ton for 60 miles, $2.45 for 80 miles*, $2.75 for 100 miles, and $3.12 for 120

* The Commission found that the average distance from the Middle and Leetonia districts to the Cleveland area was 80 miles (p. 102).

> miles, based on loads of 23 tons. The 60-mile hauls contemplate 4 round trips a day, with 2 drivers for each unit. For the hauls of 80, 100, and 120 miles, 3 round trips a day are contemplated for each unit, with either 2 or 3 drivers for the 80-mile haul and 3 for the other hauls. All of the data are based on the use of the trucking equipment 240 days a year, but the statement is made that it could be used at least 300 days a year.

6. In connection with the trucking from Raymilton, the Illuminating Company experienced certain kinds of savings other than in connection with the line-haul rates. These averaged 40 cents a ton. (p. 97)

7. The intrastate reductions were decided upon by the responsible traffic officials of the principal rail carriers in order to forestall the diversion of this traffic to trucks. (p. 88)

8. Even before the 44-cent reduction became effective within Ohio, mines in the Clarksburg area in the Fairmont District of northern West Virginia lost some business in the Cleveland area by reason of intrastate truck transportation. (p. 104) Specific evidence to the same effect given by a company which owns and operates a mine at Cassville, West Virginia. in the Fairmont District is set forth in some detail in the Commission's report. (p. 105) The Commission, in referring to the contentions of the interstate shippers, said (p. 106):

> They point out, and the record shows, that the natural tendency will be for the consumers in the Cleveland area to reduce further their purchases of steam coal from the higher rated interstate districts if the Ohio rates are increased to their former level, thereby creating a more serious source of injury to them than to the Ohio shippers.

This finding of the Commission shows that at the higher rate level, the interstate shippers will not regain the business that will be lost to intrastate truck movements.

9. The Commission's statement with respect to the revenue effect of the 44-cent intrastate reduction, and what the effect would be of restoring the intrastate rates to their former level, reads as follows on page 102:

> In 1953 the Ohio No. 8, Cambridge, Middle, Leetonia, Massillon, and Crooksville districts (the Ohio districts from which the reduced rates apply) shipped by rail 3,423,755 tons of coal to Cleveland, Lorain, Avon Lake, and Willoughby. If the 44-cent reduction had been in effect at that time, the rail revenues would have been reduced by $1,506,452. However, the diversion of 1 million tons of coal from rail to truck would have resulted in a revenue loss of $1,293,548 under the rate of $2.80, and of $1,563,548 under the rate of $3.07. The 44-cent reduction on 3,423,755 tons would have been offset by a diversion of 538,018 tons to trucks based on the rate of $2.80.

This finding of the Commission, stated in other words, says that the revenues which the rail carriers would lose by the diversion of one million tons to truck, would exceed by $1,293,548 (based on the unreduced rate of $2.80 from the Middle district) the reduction in revenues which would follow if the rail carriers retained all the traffic at the reduced rate of $2.36.

These facts clearly show the size of the present truck competition and the potential large loss of traffic to the trucks.

**QUESTION NO. II**

It is significant that the Commission does not say that there will be no loss of traffic to trucks. But it seeks to minimize the truck competition by the finding: (App. B, 298 I.C.C. 109)

> "There is some truck competition from the Middle and Leetonia districts, but it is indicated that it is not of sufficient severity to warrant different treatment of the rates from those districts and the rates from the other districts."

This finding, however, is in the present tense; it disregards the greatly enlarged imminent diversion to trucks disclosed by the evidence and the other findings. The court below treats this finding as sufficient on the ground that when the Commission said "is" it didn't mean "is" but also "will be in the future", and accordingly holds that the finding also covers potential diversions of traffic. The courts are supposed to take findings as they are, not to reconstruct them, so as to provide findings which the agency did not make. *Colorado-Wyoming Gas Co.* v. *F.P.C.*, 324 U.S. 626, 634 (1945). The agency must be assumed to have said what it meant to say. Here the examiner referred to the "actual and potential" loss to truck competition. The Commission's elimination of all but the present tense can hardly have been accidental. This is particularly so when the evidence would not have supported any such finding for the future.

Furthermore, this is not a reason for leaving the intrastate rail carrier defenseless against truck competition. If interstate short-haul traffic is also confronted with truck competition, the appropriate remedy is to reduce the interstate rate, as the inter-

state carriers have already done for traffic from the Raymilton area to Ashtabula. If other interstate traffic is indirectly affected, a remedy should be sought which does not deprive the intrastate rail carrier of all means of competing with the trucks.

**QUESTION NO. III**

The Commission held that it had no power to require a reduction in the interstate rates in order to correct undue preference and prejudice between intrastate and interstate persons and localities. Appellants assert that it does have such power.

The lower court declined to pass directly upon the question. However, it expressed the view that since the Commission found the interstate rates to be reasonable, the remedy of reducing the interstate rates was thereby foreclosed or would not have been exercised in any event. Before proceeding with a consideration of the Commission's power with respect to interstate rates in a section 13 proceeding, we deal with the mistaken view of the lower court as to the controlling effect of the finding that the interstate rates are reasonable. The problem as to this in a section 13 case is no different than if all rates involved were interstate and the issue arose under section 3(1). In such a case, *United States* v. *Illinois Central R. R. Co.*, 263 U.S. 515 (1924), which sustained the order in *Swift Lumber Co.* v. *F. & G. R. R. Co.*, 61 I.C.C. 485, this Court said (p. 524):

> * * * But the mere fact that the Knoxo rate is inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice.

*American Express Co.* v. *Caldwell*, 244 U.S. 617, 624.

This question has never been before this Court in a section 13 case. It is, however, of considerable importance in the administration of the Interstate Commerce Act, not only to the parties to this litigation but to the shippers and railroads generally, for this Court to determine whether preference and prejudice as between intrastate and interstate shippers and localities must always be remedied by increasing the intrastate rates or whether the interstate rates may be reduced in order to re-establish what the Commission believes is a rate adjustment free of such preference and prejudice.

When there is an issue as to the lawfulness of the relation between interstate and intrastate rates, both rates are necessarily in issue or else no question of relationship can arise. The requirement that rates be free from preference and prejudice is a relationship requirement. It cannot be made the basis for an increase in the intrastate rates for the purpose of increasing the revenues of the railroads. If the latter is to come about, it must be based on an ultimate finding of revenue discrimination against interstate commerce, a ground which the District Court did not pass upon as support for the order.

The lower court was in error in saying that it was clear from the Commission's opinion that it would have reached the same result without regard for this question. The Commission's finding as to preference and prejudice was independent of its determination as to the relief available. It cannot be assumed that the Commission would not have reduced the interstate

rates if it had not erroneously believed that it lacked authority to do so.

In the *Shreveport* case, *Houston E. & W. T. R. Co. v. United States,* 234 U.S. 342 (1914), which arose prior to the enactment of section 13(4), but where it was alleged that there was undue preference and prejudice as between persons and localities in intrastate and interstate commerce, this Court held that the Commission had the power under section 3(1) of the Interstate Commerce Act to find and order the removal of undue preference of intrastate shippers and localities. The order sustained in that case was in the alternative so that the railroads were permitted to remove the discrimination either by reducing the interstate rates to the level of the competitive intrastate rates or by increasing the intrastate rates to the level of the interstate rates. In that case, at pages 349-350, this Court said:

> "Manifestly the order might be complied with, and the discrimination avoided, either by reducing the interstate rates from Shreveport to the level of the competing intrastate rates, or by raising these intrastate rates to the level of the interstate rates, or by such reduction in the one case and increase in the other as would result in equality. * * *"

It would seem absurd to hold that the issues raised in an investigation instituted under the subsequently enacted section 13(4), and the power of the Commission under that section, are more limited than before that section was enacted. Section 13 was intended to codify, not to narrow, the power exercised by the Commission in the *Shreveport* case.

The very terms of section 13(4) show an intent on the part of Congress to confer on the Commission the power to reduce interstate rates, if that is the appropriate form of relief, whenever there is a finding of undue preference to intrastate shippers and localities and of undue prejudice against interstate shippers and localities. The power conferred is to "prescribe the rate, * * * or the maximum or minimum, or maximum, and minimum, thereafter to be charged, * * * *in such manner as in its judgment* will remove such advantage, preference, prejudice or discrimination." It is obvious that the only alteration possible in an intrastate rate for any one of the purposes stated would be an increase, that is, the prescription of a minimum rate. It follows that the power to prescribe a "maximum" rate to remove such advantage, preference, prejudice or discrimination as may be found by the Commission, is a power necessarily directed to the competitive interstate rate involved in the rate relation under consideration.

The question of the Commission's power to reduce the interstate rates in a section 13 proceeding has a peculiar significance in the instant case. In the course of its report the Commission found that the revenues lost upon the diversion of much less than a million tons of coal per year would exceed the revenues gained by a 44-cent increase in the intrastate rates as applying to the remaining tonnage. This means, in the protection of railroad revenues for the purposes declared in section 15a(2) of the Act, that it was the duty of the Commission to permit the continued maintenance of the truck competitive intrastate level and to meet the commercial needs of the interstate shippers by requiring corresponding reduc-

tions in the interstate rates. That is the only alteration in the rates in issue before the Commission which would preserve historical relationships, satisfy the competitive needs of interstate shippers and, at the same time, satisfy the railroad revenue needs to the maximum extent.

Appellants submit that they are entitled to have the Commission consider this case under a proper interpretation of its power under the Act and that the District Court erred in refusing to consider this contention of appellants.

**QUESTION NO. IV**

In *United States* v. *Illinois Central*, 263 U.S. 515, 524 (1924) this Court laid down the rule that a

> . . . difference in rates cannot be held illegal [because unduly preferential and prejudicial] unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions.

In *Ohio* v. *United States*, 292 U.S. 498, 504 (1934) in which this Court sustained the Commission's order in the prior case, such a finding was present in support of the Commission's conclusion that the rates resulted in preference and prejudice. There the Court said (italics supplied):

> * * * From the record it [the Commission] concluded that coal is transported from the Ohio mines to the destinations in question "at intrastate rates *which are generally substantially lower, distance considered,* than are the reasonable interstate rates herein provided, under which such coal is moved to such destinations from Pennsylvania and West Virginia;" and that *"this dis-*

*parity in rates is greater than is warranted by differences in transportation conditions* from the Ohio mines on the one hand and the Pennsylvania and West Virginia mines on the other."

There is no similar finding here. Without it, there is no legal basis for the Commission's conclusion of preference and prejudice, for unless a given difference in rates is *not justified* by differences in transportation conditions, that difference cannot result in unlawful preference and prejudice.

When, for example, the Commission required the rate from the Ohio No. 8 District to Cleveland to be increased by 44 cents to $3.07 for an average distance of 128 miles when the interstate rate from the Fairmont District is $3.37 for an average distance of 247 miles, it did not rely on transportation standards but it merely required an increase from Ohio No. 8 to restore the previously existing difference in cents.

Reliance on historical relationships is not enough to show compliance with *United States* v. *Illinois Central*, 263 U.S. 515, *supra*. Appellants do not deny that such commercial needs have a place in the making of rates on bituminous coal. But rates cannot be based wholly on commercial needs. *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 592 (1949). An order so based runs contrary to the rule in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U.S. 42, 46 (1911), in which this Court said: "The law does not attempt to equalize fortune, opportunities, or abilities."

The Illuminating Company introduced evidence to show that, by various transportation standards, the intrastate rates were relatively higher than the inter-

state rates. One such test compared the average revenue received by the railroads at the reduced intrastate rates with the revenue received by the railroads on all interstate movements of coal to and from Ohio. Another test showed that, on traffic of the Illuminating Company moving to the involved destinations from intrastate and interstate origins, the ratio of revenue received by the rail carriers to their out-of-pocket cost was greater for the intrastate traffic than for the interstate traffic. While the District Court rejected the former test as not being relevant to the issues, it made no mention of the latter. Nor did it point to a single finding of the Commission which showed that the difference in rates was justified by transportation conditions.

The Commission recited the evidence referred to but said (App. B, 298 I.C.C. 101):

> * * * It is of course recognized that cost is only one of a number of important elements to be considered in determining the lawfulness of rates, and that rates on coal are not generally made on a mileage basis but are related to one another by group differentials which usually reflect competitive needs more than distance.

Thus, the Commission abandons transportation standards and takes refuge in assumed competitive needs and historical relationships. These furnish no basis for a conclusion of undue preference and prejudice.

## CONCLUSION

For the reasons herein set forth, it is submitted that the questions here presented are substantial and of general public importance and that the Court should have the benefit of oral argument and briefs on the merits.

Respectfully submitted,

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# APPENDIX A

## APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *Plaintiff*

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, *Defendants*

THE NORTH AMERICAN COAL CORPORATION, *Plaintiff*

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, *Defendants*

OHIO COAL ASSOCIATION, *Plaintiff*

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, *Defendants*

Civil Actions Nos. 32881, 32882, 32886

December 17, 1956

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McNAMEE, District Judge:

These consolidated cases were separately brought against the United States and the Interstate Commerce Commission (hereinafter called the Commission) by the Cleveland Electric Illuminating Company, a producer and distributor of electricity and steam in the Cleveland area, the North American Coal Company, a producer and shipper of bituminous coal, and the Ohio Coal Association, an organization of coal producers, to vacate the Interstate Commerce Commission's order of March 5, 1956 in its re-opened

Docket No. 25566—Intrastate Rates on Bituminous Coal Within Ohio. 298 I.C.C. 85.

The Commission's order was entered pursuant to authority conferred by Section 13 (3) (4) of the Interstate Commerce Act, 49 U.S.C., and requires respondent railroads to restore to their August 1, 1954 level the intrastate rates on bituminous coal transported by railroad from the Middle, Leetonia, Ohio No. 8, Cambridge and Crooksville coal mining districts in Ohio to Cleveland, Lorain, Avon Lake and Willoughby, Ohio and affected intermediate points.

The effect of the Commission's order is to eliminate a reduction of 44 cents per ton in these intrastate rates which became effective on August 2, 1954. By order entered July 6, 1956 in these proceedings this court temporarily restrained the defendants United States of America and the Interstate Commerce Commission from making effective the aforesaid order of the Commission.

Thereafter all the affected railroads except the Nickel Plate intervened as a matter of right pursuant to Section 2323 Title 28 U.S.C. and became parties defendant herein. In the proceedings before the Commission the Nickel Plate was aligned with the plaintiffs in opposition to the other railroads, but apparently that carrier has acquiesced in the Commission's order and is not a party to this action.

The order of the Commission is based upon its conclusions that the reduced intrastate rates caused undue preference to intrastate persons and localities and undue prejudice to interstate localities and shippers of bituminous coal, and unjust discrimination against interstate commerce.

Plaintiffs attack the validity of the Commission's order on several grounds, their principal contentions being that the conclusions of the Commission are not supported by necessary subsidiary findings of fact; that such conclusions are in certain respects contrary to the subsidiary findings;

and that the conclusions and subsidiary findings are not supported by substantial evidence. It is contended also that there is no rational basis for the Commission's order and that the order rests upon misconceptions of the Commission as to its authority under the Interstate Commerce Act.

### Scope of the Inquiry.

Before proceeding to consider the issues raised by the Complaints it is necessary to dispose of the contention of the intervening railroads that the scope of the inquiry in this action should be limited to a consideration of the validity of the finding of the Commission that the increased intrastate rates prescribed by its order are reasonable. The intervenors do not question the right of the plaintiffs to maintain this action. They concede that as shippers and a receiver of coal, plaintiffs are entitled to reasonable intrastate rates, but insist that in the enforcement of their rights plaintiffs may question only that "particular portion of the Commission's order" which is based upon its finding that the prescribed intrastate rates are reasonable.

We find the contention to be without merit. It rests upon the false premise that the railroads alone have the right to question the validity of the Commission's order as a whole. It is of course true that the order of the Commission is directed to and binding only upon the carriers. While the order of the Commission is not addressed to the plaintiffs, they are affected by its terms, and an order of the Commission made without authority is as much a denial of plaintiffs' rights to reasonable rates as an order that prescribes excessive intrastate rates but is in all other respects valid. Increased intrastate rates prescribed by the Commission in a Section 13 proceeding may be unreasonable simply because they are excessive or not supported by a valid finding of fact as to their reasonableness. But such rates may be unreasonable also where there is no legal justification for any increase at all. Plaintiffs would

be equally aggrieved whether the Commission exercised its authority unreasonably in prescribing excessive intrastate rates or whether the Commission prescribed such rates under circumstances where it had no jurisdiction to act.

Plaintiffs have not confined their attack to any particular portion of the Commission's order. They have assailed the action of the Commission on several grounds that challenge the validity of the Commission's order in its entirety. In this state of the record we find no basis in reason for denying plaintiffs the right to prove, if they can, that the order of the Commission is unlawful in any of the respects alleged in the Complaints. Nor have the intervenors submitted any authority in support of their position. Their reliance upon *Sprunt* v. *United States*, 281 U.S. 249, and *Youngstown* v. *United States*, 295 U.S. 476, is misplaced. In *Sprunt* the plaintiffs sought a review of a Section 3 proceeding in which an undue preference and advantage in favor of plaintiffs was eliminated by an order of the Commission equalizing the rates on export cotton shipped to waterfront warehouses and to uptown and interior plants. The competitive advantage which plaintiffs enjoyed "was merely *an incident of and dependent upon* the right, if any, of the carriers to maintain the former tariff in force." (Emph. sup.) The order of the Commission in that case violated no independent right of the plaintiffs, and for this reason the court held they had no independent standing to maintain the action. In *Youngstown* v. *Ohio, supra*, the defendants, relying upon the authority of *Sprunt*, challenged the right of the plaintiffs as shippers and a receiver of coal to maintain an action to set aside the order of the Commission increasing intrastate rates in a Section 13 proceeding. In overruling defendants' motion to dismiss the action, the Supreme Court approved the reasoning of the District Court which distinguished the Sprunt case, and held that plaintiffs who had raised the question of the reasonableness of the increased intrastate rates were "entitled to bring and main-

tain this suit to set aside the order." To the same effect is *Anchor Coal Co.* v. *United States,* 25 F. (2d) 462. In each of the cited cases the issue was whether plaintiffs were entitled to maintain the action. In none of those cases was the question of a limitation of the scope of the inquiry presented. However, it is significant that in *Youngstown* and *Anchor Coal Co.* the independent rights of the shippers and receivers to reasonable rates were considered as ample warrant for full scale attacks upon the orders of the Commission. The contention of the intervenors is rejected.

### Background of the Case

This is the latest chapter in a series of formal investigations of the lawfulness of the rates on the transportation of bituminous coal within the State of Ohio.

Brief reference to earlier proceedings before the Interstate Commerce Commission and the Public Utilities Commission of Ohio and the reviews of those proceedings by the United States courts and the Supreme Court of Ohio will serve to illuminate the nature of the previous controversies and shed light upon the issues here presented.

For many years prior to August 1, 1932 the rates from mining districts in Ohio to destinations in the northeastern part of the State were related by fixed differentials to the rates from mining districts in Pennsylvania and West Virginia. On August 1, 1932 the Ohio Public Utilities Commission reduced various intrastate rates to northeastern Ohio in amounts ranging from 4 cents to 29 cents per ton. The lawfulness of the reduced rates was challenged by the principal railroads (excepting the Wheeling & Lake Erie, now part of the Nickel Plate) operating in the State of Ohio, in a petition filed with the Interstate Commerce Commission in Docket No. 25566. By its decision, reported in 192 I.C.C. 413, the Commission found that the intrastate rates on bituminous coal between the points there in

controversy, which include places of origin and destinations involved in the case at bar, resulted in undue preference of Ohio shippers and localities and undue prejudice to localities and shippers in interstate commerce, and in unjust discrimination against interstate commerce in violation of Section 13 (4) of the Interstate Commerce Act. The Commission directed the carriers to establish and maintain intrastate rates at a level not lower than the rates in effect on July 31, 1932. The order of the Commission was upheld by a three-judge court of the Southern District of Ohio on the ground that the reduced rates were unduly preferential to persons and localities in Ohio and unduly prejudicial to persons and localities in other states; but the court did not find it necessary to pass upon the finding of the Commission that such rates resulted in discrimination against interstate commerce. *State of Ohio* v. *United States,* 6 F. Supp. 386. The action of the three-judge court was reviewed and affirmed by the Supreme Court of the United States in *Ohio* v. *United States,* 292 U.S. 498.

It was said by the District Court in the above cited case and reaffirmed by the United States Supreme Court in its opinion that—

> "Prior to August 1, 1932 there was maintained . . . a finely balanced and nicely adjusted schedule of interstate and intrastate rates on bituminous coal from Western Pennsylvania, Northern West Virginia, and Ohio coal mining districts to Northeastern Ohio with fixed differentials which have been regarded as essentially reasonable in view of all the elements which must be considered in rate making." 6 F. Supp. 387; 292 U.S. at p. 502.

When the intrastate rates in effect prior to August 1, 1932 were re-established the "finely balanced and nicely adjusted" schedule of differentials between intrastate and interstate points of origin was restored. At that time the rate from the Ohio No. 8 district to Cleveland was $1.74 per ton, which was ten cents per ton less than the rate

from the Pittsburgh, Pennsylvania district and 25 cents per ton less than the rate from the district of Fairmount, West Virginia.

Thereafter on several occasions the Ohio Commission authorized the same general increases in intrastate rates as were authorized by the Interstate Commerce Commission for general revenue purposes in Ex Parte Nos. 115, 162, 166, 168 and 175. Specifically, on May 7, 1953, the Ohio Commission in its proceeding corresponding to Ex Parte No. 175 approved and adopted as reasonable proposed increases in the intrastate rates on bituminous coal similar to those approved by the Interstate Commerce Commission. The action of the Ohio Commission was upheld by the Supreme Court of Ohio in *Toledo-Edison Co.* v. *Public Utilities Commission of Ohio*, 161 O.S. 221, 118 N.E. 2nd 531 (1954). Thus, on August 1, 1954 the intrastate rates were $2.80 per ton from the Middle and Leetonia districts and $3.07 per ton from Ohio No. 8. During the period of general rate increases the differentials between Ohio and interstate origins were not altered to any substantial extent. Early in 1954, after the Ohio Commission had found the proposed intrastate rates reasonable, the Cleveland Electric Illuminating Company, which is the largest consumer of bituminous coal in northern Ohio, opened negotiations with the railroads looking to reductions in intrastate rates, on the ground that such reductions were necessary to prevent a large-scale diversion of coal traffic to trucks.

The cost of transporting coal represents about 34% of the Illuminating Company's production costs. In an effort to reduce its costs, the Illuminating Company, in 1950, began to experiment with transporting coal by trucks. The company's trucking operations expanded beyond the experimental stage and in 1953 a substantial amount of coal was hauled by trucks from the mines at Raymilton, Pennsylvania to the company's generating plant at Ashtabula,

Ohio, a point not within the scope of these proceedings. The volume of coal transported by trucks from Raymilton, Pennsylvania to Ashtabula, Ohio increased considerably in the early part of 1954, and in April of that year the railroads reduced the Raymilton-Ashtabula interstate rate from $2.67 to $2.36 per ton. As a result of this reduction, which is still in effect, the movement of coal by rail from Raymilton to Ashtabula has been resumed. Late in 1953 and early in 1954 the Illuminating Company also received some coal at its Willoughby plant, which was transported by truck from the Middle and Leetonia districts of Ohio, and experimented with a few shipments of coal by truck from the Ohio No. 8 district.

In May, 1954 the railroads decided to meet the threatened truck competition by reducing the rates on bituminous coal 44 cents a ton from the Middle, Leetonia, Ohio No. 8, Cambridge and Crooksville districts in Ohio and to apply the same reduction in the rates on the transportation of coal originating in the Pittsburgh and Connellsville districts in Pennsylvania and the Fairmount and Moundsville districts of West Virginia. Tariffs embodying the reduced rates were filed with the Interstate Commerce Commission and with the Ohio Public Utilities Commission, to become effective August 2, 1954.

Upon the publication of the reduced rates the railroads were besieged with requests for other reductions in rates by shippers and consumers in origin districts and destinations not affected by the 44 cent reduction. As a result of these widespread demands the railroads decided that the entire matter ought to receive further consideration before the reduced rates became effective. The railroads therefore made application to postpone the effective date of the reduction in both intrastate and interstate rates. The Interstate Commerce Commission granted the postponement as to interstate rates, and the proposal to reduce such interstate rates was cancelled after the Commission's

order in this proceeding was issued. The Ohio Public Utilities Commission refused to comply with the railroads' request to stay the effective date of the reduced intrastate rates. These rates therefore became effective as of August 2, 1954. Immediately thereafter the Nickel Plate applied the reduced intrastate rates and as a consequence the other railroads were compelled, for competitive reasons, to adopt the same rates on intrastate shipments of coal.

Shortly after August 2, 1954 all the railroads, except the Nickel Plate, filed a petition with the Interstate Commerce Commission alleging that the reduced intrastate rates constituted a violation of the Commission's order of May 2, 1933 in No. 25566—192 I.C.C. 413,—and sought enforcement of that order or such other relief as might be warranted. On September 21, 1954 the Interstate Commerce Commission re-opened the 1933 case to determine whether the intrastate rates on bituminous coal to Cleveland, Lorain, Avon Lake, Willoughby, and intermediate points contravened—(a) the requirements of the order of May 2, 1933, and (b) the provisions of Section 13 (3) (4) of the Interstate Commerce Act.

After extensive hearings the Commission, on March 5, 1956, found that the reduced intrastate rates in issue did not violate its order of May 2, 1933. However, the Commission did find that those rates "are and for the future will be unduly preferential of Ohio shippers and localities and unduly prejudicial to interstate localities and shippers from origin districts in Pennsylvania and West Virginia, particularly the Moundsville and Fairmount districts" and that said rates are causing unjust discrimination against interstate commerce. On the basis of these findings the Commission entered its order requiring that the intrastate rates in effect on August 1, 1954 be re-established on or before June 28, 1956, upon not less than 30 days' notice. By order entered May 21, 1956 the Commission postponed the effective date of the increases in the intra-

state rates from June 28, 1956 to July 9, 1956 and shortened the notice requirement from 30 to 10 days, and on June 25, 1956 it denied petitions for re-argument and further consideration filed by the Nickel Plate Railroad and the plaintiffs herein.

### Is the Commission's Order Valid?

Immediately prior to the effective date of the reduced rates there existed that "finely balanced and nicely adjusted" schedule of differentials which had been maintained over the course of many years. The reduction of 44 cents per ton in the intrastate rates caused a radical derangement in the system of differentials. For example, the rate from the Ohio No. 8 district, which is the principal Ohio district shipping coal to the Cleveland area, was lowered from $3.07 a ton to $2.63. Before the reduction the rate from this district was 12 cents less than the Pittsburgh rate of $3.19. As a result of the reduction, the differential between these points of origin rose to 56 cents. The spread between the rates from Ohio No. 8 and the Fairmount, West Virginia district increased from 30 cents a ton to 74 cents when the reduced rates became effective; and the differential between the Middle district of Ohio and the Fairmount district was increased from 57 cents to $1.01 per ton.

The Commission found there is keen competition in the Cleveland area between the Ohio districts from which the reduced rates apply and some of the interstate districts, particularly the Fairmount, Moundsville and Butler-Mercer districts, and that shippers in the latter districts have been adversely affected by the wide spread between the intrastate and interstate rates to the Cleveland area.

The Commission found also that conditions incident to the transportation of coal from origins in Ohio and from origins in adjoining States to the Cleveland area are similar; that the pertinent interstate rates are reasonable, and that the re-establishment of the pre-existing intrastate

rates will not result in rates that are unreasonable. In its Conclusion No. 4 the Commission found—

> "4. The intrastate rates here in issue from the Ohio No. 8, Middle, Leetonia, Cambridge, and Crooksville districts to the destinations defined in finding 1 are, and for the future will be, unduly preferential of Ohio shippers and localities and unduly prejudicial to interstate localities and shippers of bituminous fine coal from origin districts in Pennsylvania and West Virginia, particularly the Moundsville and Fairmount districts, to the same destinations."

Plaintiffs attack Conclusion No. 4 upon several grounds. They assert that the basic facts in the Commission's report show that the reduced intrastate rates are relatively higher than the interstate rates when tested by transportation standards. In support of this contention they rely upon statements in the Commission's report showing that the average distance of intrastate shipments to the Illuminating Company in 1953 was 131.8 miles, and the average revenue $3.05 per ton which, by giving effect to the 1954 reduction of 44 cents, would be $2.61 per ton. They compare this revenue to the earnings of $2.52 per ton for an average haul of 125.6 miles on interstate shipments to and from Ohio in 1953. This is not an apt comparison. There is no relevant relation between rates on intrastate shipments to the Illuminating Company and rates on a heterogeneous combination of shipments into and out of Ohio from various points of origin to diverse destinations. We are concerned here with the relation between intrastate and interstate rates to a common destination area. It is obvious that if the average distance of intrastate movements of coal to the Illuminating Company was 131.8 miles, the average distance of the interstate shipments to that company's plants from the more remote interstate districts would be greater and that the average revenue on such longer hauls at higher interstate rates would be in excess of the average revenue on the shorter haul of 131.8 miles.

It is urged also that the earnings per ton mile on shipments on the reduced intrastate rates were greater than the per ton mile earnings of the interstate shipments moving on the higher rates. But even if this were true, it would not demonstrate that the intrastate rates were relatively higher. It is an axiom of rate-making that the longer haul yields a lower per ton mile return. *Ohio* v. *United States,* 292 U.S. 478.

Plaintiffs also attack the finding of the Commission that the truck competition from the Middle and Leetonia districts was not sufficient to warrant a change in the rates from those and other districts. The question whether there is sufficient actual and potential truck competition to warrant a reduction in intrastate rates is a vital issue in the case. As shown above, it was the threat of truck competition that caused the railroads voluntarily to reduce their rates on the transportation of coal. In discharging its task of determining whether such competition was a substantial threat to the business of the railroads, the Commission considered all of the evidence relative to the volume of trucking actually done as well as the indicated purpose of the Illuminating Company to truck one million tons of coal if the prior intrastate rates were re-established.

The hearings before the Commission were held by an examiner who submitted a proposed report in which he found *inter alia* that there was no truck competition from the Crooksville, Cambridge and Ohio No. 8 districts, but that "There is actual and substantial truck competition from the Middle and Leetonia districts in Ohio to the Cleveland area." The Commission agreed with the examiner's findings as to the absence of truck competition from the Crooksville, Cambridge and Ohio No. 8 districts. (These findings are supported overwhelmingly by the evidence and are not seriously questioned.) However, the Commission found that "There is some truck competition from the Middle and Leetonia districts, but it is indicated that

it is not of sufficient severity to warrant different treatment of the rates from those districts and the rates from the other districts."

It is suggested that in the above finding the Commission was referring only to actual truck competition. The language of the finding may be wanting in specificity, but there can be no doubt that by the phrase "some truck competition" the Commission meant potential as well as actual truck competition. While the courts insist upon findings that are formulated in clear and definite terms, we have it on high authority that it is enough if the Commission expressed its findings with sufficient clarity "to enable the parties and ourselves to understand with a fair degree of assurance why the Commission acts as it does. *Eastern Central Association* v. *United States,* 321 U.S. 194, 211-212.

It would serve no purpose to review at length the evidence on this issue, which is set out with great particularity in the Commission's report. All pertinent facts, both favorable and unfavorable to the position of plaintiffs, were considered by the Commission.

The actual trucking of coal to the Illuminating Company plants from Raymilton, Pennsylvania and from the Middle and Leetonia districts in Ohio was done by producers who supplied the coal. It was the Commission's view that the trucking rates charged by the producers were not reliable indicators of fair rates for that mode of transportation. In the two instances where the trucking rates from Raymilton were reduced ten cents a ton by the producers, these reductions were offset by contemporaneous increases in like amounts in the price of the coal, with the result that the total delivered price to the Illuminating Company remained unchanged. The average rate of trucking from the Middle and Leetonia districts was said to be $2.80 per ton, which is the same as the prior rail rate from the same districts. It was shown that if the Illuminating

Company embarked upon a program of trucking upwards of a million tons of coal from the Middle and Leetonia districts and from Raymilton, this would require the company either to purchase the necessary equipment and do the hauling itself, or to engage a competent trucking company for that purpose. In this connection the Illuminating Company submitted four studies of the cost of such large scale trucking. Two of these studies were prepared by companies that had no experience in trucking and they contain no items for profit. The third study, which was merely a comparison of the cost of trucking coal with an estimate of the cost of hauling iron and steel, was likewise deficient in its omission of any consideration of profit. The fourth study contemplated the use of a light-weight tractor and an aluminum trailer which, the Commission observed, had never been tested and "so far as appears it is merely in the blueprint stage." Evidence of many other factors bearing upon this issue were also referred to in the Commission's report. These included a survey of the Nickel Plate Railroad showing the amount of trucking to the Cleveland area in the first eleven months of 1954; the increased use of trucks for the delivery of coal to the cities of Akron, Canton and Massillon from the nearby mines in the Middle and Leetonia districts; the large general increase in the use of trucks for transporting coal in Ohio, and the absence of such an increase in trucking to the Cleveland area. There was evidence also of a substantial increase in the tonnage of coal transported by rail to the Cleveland area in recent years.

It may be that on the basis of the evidence, reasonable minds might disagree as to the extent of the probable future truck competition from the Middle and Leetonia districts. However, it is the function of the Commission to weigh the evidence and draw the inferences therefrom. This court cannot substitute its judgment or the judgment of the examiner for that of the Commission. In determining the issue of truck competition, as well as all other

factors involved in rate-making the Commission is peculiarly qualified by training and experience to form sound judgments. Under our limited jurisdiction it is not for us to say whether we would have reached the same conclusion on the same evidence or whether we disagree with the reasoning of the Commission or the wisdom of its determination. It is enough that the Commission's finding on the issue of actual and potential truck competition, which necessarily rests upon a compound of fact and prophecy, is supported by substantial evidence and a fair and informed forecast of future probabilities.

We have considered all other arguments in opposition to Conclusion No. 4 but find them to be without merit. On the basis of the record we hold that Conclusion No. 4 is adequately sustained by subsidiary findings of fact which are supported by substantial evidence, and that the order of the Commission is justified by its conclusion that intrastate rates in issue have caused undue preference and prejudice between persons and localities in intrastate and interstate commerce.

Some of the interstate shippers testified that before the intrastate rates were reduced they had sustained losses in business to the Cleveland area by virtue of truck competition in Ohio. As the Commission noted, the record showed that if the intrastate rates were increased there would be a resumption of truck competition which would be a more serious source of injury to these shippers than to shippers from the Ohio districts. In view of this, the interstate shippers suggested that the pre-existing differentials be restored by reducing the interstate rates instead of increasing the rates on intrastate shipments. The Commission declined to adopt the suggestion on the ground that it was without power to reduce the interstate rates in this proceeding, which, in its view, presented the sole issue of the lawfulness of intrastate rates. Plaintiffs contend that the Commission was in error in thus construing

its authority under Section 13 (4) and urge that we remand the case for further proceedings "consistent with the proper construction of the governing statute." Plaintiffs recognize, however, that this court cannot compel the Commission to reduce the interstate rates and that even if we reversed the Commission on this point, the effect of such an adjudication would be to hold merely that the Commission might choose between the alternatives of raising the intrastate rates or reducing the rates from the interstate districts.

However, the plaintiffs suggest that there are statements in the report from which an inference arises that if the Commission had not considered itself without power to do so, it would have reduced the interstate rates. We do not agree. The Commission's disclaimer of power to reduce interstate rates was unnecessary. It is clear from a reading of the report that the Commission's refusal to reduce such rates was also based upon grounds entirely unrelated to its presumed lack of power to do so. Furthermore, the Commission's findings that the intrastate rates were unlawful and that the interstate rates were reasonable, effectively foreclose the possibility of any reduction in the latter rates upon a remand of the case. We find no purpose to be served in passing upon this question and, for the reasons indicated, decline to do so.

The Commission's order is based also upon its ultimate finding No. 5 that the intrastate rates here in issue are causing unjust discrimination against interstate commerce. In dealing with undue preference and prejudice between persons and localities in relation to interstate commerce the question is one of the relation of rates to each other. In dealing with the right of the Commission to change intrastate rates in the interest of the carrier's revenue, the question is that of the relation of rates to revenue. *Florida* v. *United States,* 282 U.S. 194, 214.

The controversy here, so far as it relates to the revenue issue, involves questions as to the adequacy of the Commission's subsidiary findings. Whether such findings are as definite and precise as required by law, and whether all necessary subsidiary facts are stated in the report, present close and interesting questions involving the application of the principles laid down in *Florida* v. *United States,* 282 U.S. 194; *North Carolina* v. *United States,* 325 U.S. 507; *King* v. *United States,* 344 U.S. 254; *Mississippi Public Service Commission,* 124 F. Supp. 809, affirmed, 349 U.S. 908. However, a determination of those questions is not essential to a definitive holding in respect of the validity of the Commission's order. Having held that the order of the Commission is justified by its finding of undue preference and prejudice, we are not required to pass upon the validity of its conclusion in respect of revenue discrimination. It is firmly settled that an order of the Commission prescribing intrastate rates in a Section 13 proceeding may be justified upon the sole ground that the intrastate rates in issue have caused undue preference and prejudice between persons and localities in relation to interstate commerce. *Ohio* v. *United States,* 292 U.S. 498; *Louisiana Public Service Commission* v. *Texas & N. O. Railroad,* 284 U.S. 125.

In its review of the original order in this proceeding in 1932 the three-judge court rested its decision upon this single ground, although that case also involved the issue of unjust discrimination against interstate commerce. *Ohio* v. *United States,* 6 F. Supp. 386. Considerations similar to those that militated against a decision of the revenue question in the earlier case are present here, and for like reasons we find it unnecessary to decide the issue raised as to the Commission's Conclusion No. 5.

A decree may be prepared in accordance with the foregoing.

Allen, Circuit Judge, and Jones, District Judge, concur.

# APPENDIX B

# INTERSTATE COMMERCE COMMISSION

## No. 25566

## INTRASTATE RATES ON BITUMINOUS COAL WITHIN OHIO

*Decided March 5, 1956*

Ohio intrastate rates on bituminous coal, in carloads, to Cleveland, Lorain, Avon Lake, and Willoughby, Ohio, and intermediate points, found not in contravention of the requirements of the prior order entered herein on May 2, 1933, but shown to cause unjust discrimination against interstate commerce and undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce. Unlawfulness ordered removed. Prior report, 192 I. C. C. 413.

*Edward A. Kaier*, *L. James Huegel*, *Leo P. Day*, *Eugene E. Anderson, Jr.*, *Robert B. Claytor*, *John W. Hanifin*, *Thomas O. Broker*, *K. A. Dobbins*, and *A. C. Armstrong* for respondents.

*C. F. Taplin, Jr.*, *George D. Kinder*, *Bruce W. Eaken*, *Crede C. Calhoun*, *Nuel D. Belnap*, *Donald H. Hauser*, and *Lee C. Howley* for protestants.

*Ralph S. Locher* and *Andrew R. Sarisky* for the city of Cleveland, Ohio.

*William M. Maddox*, *Homer S. Carpenter*, *Jerome H. Simonds*, *Samuel P. Delisi*, *Henry M. Wick, Jr.*, *John F. Donelon*, *August G. Gutheim*, *John D. Amos*, *Wesley A. Rogers*, *R. M. Davis*, and *J. P. MacFarlane* for various coal companies or associations.

### Report of the Commission on Further Hearing

By the Commission:

Exceptions, and replies thereto, to the proposed report of the examiner were filed by the parties, and we have heard them in oral argument. Our conclusions differ in part from those recommended by the examiner. Exceptions and requested findings not discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

In the original report herein, 192 I. C. C. 413,[1] decided May 2, 1933, we found that the intrastate rates there in issue on coal from eastern Ohio districts to destinations in northeastern Ohio, were, and for the future would be, unduly preferential of Ohio shippers and localities,

[1] The original report also embraced numerous complaint and suspension proceedings, as enumerated in footnote 1 at page 413, not here reopened.

and unduly prejudicial to interstate localities and shippers of bituminous coal from defined rate districts in Pennsylvania and West Virginia, and that those rates resulted and would result in undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 of the Interstate Commerce Act. The carriers were ordered to remove the undue preference and prejudice and the unjust discrimination by establishing and maintaining intrastate rates[2] which were no lower than those in effect immediately prior to August 1, 1932, the date on which they had been reduced.[3] The order of the Commission was upheld in *State of Ohio* v. *United States*, 292 U. S. 498, and the prior rates were reestablished on February 16, 1934.

For many years prior to August 1, 1932, the rates from mining districts in Ohio to destinations in northeastern Ohio were related by fixed differentials with the rates from mining districts in Pennsylvania and West Virginia. For example, to Cleveland the rate from mines in the Ohio No. 8 district was 10 cents under the rate from the Pittsburgh district in Pennsylvania; the rate from the Connellsville district in southwestern Pennsylvania was 6 cents higher than that from the Pittsburgh district; and the rate from the Fairmount district in northern West Virginia was 9 cents higher than the rate from the Connellsville district. These differentials, which had been disrupted by the reductions in the Ohio intrastate rates on August 1, 1932, were restored when the Ohio rates were increased on February 16, 1934.

Following the adjustment of February 16, 1934, numerous general increases were made in the rates on coal from both intrastate and interstate origins. To Cleveland, for example, the rates on August 21, 1948, were $2.49 from Ohio No. 8, $2.59 from Pittsburgh, $2.65 from Connellsville, and $2.74 from Fairmont. It will be noted that, although the rates had been increased substantially, the differentials remained the same. On September 1, 1949, pursuant to the decision in Ex Parte No. 168,[4] the rates to Cleveland became $2.74 from Ohio No. 8, $2.85 from Pittsburgh, $2.92 from Connellsville, and $3.01 from Fairmont, thus making the Ohio No. 8 differentials 11 cents under Pittsburgh, 18 cents under Connellsville, and 27 cents under Fairmont. Following the decisions in Ex Parte No. 175,[5] the respective rates to Cleveland, ignoring fractions of a cent, became $3.07, $3.19, $3.27, and $3.37 on May 2, 1952.

The rate of $3.07 from the Ohio No. 8 district was applicable over interstate routes only. In the original report in Ex Parte No. 175,

[2] Rates and differences in rates are stated per net ton.

[3] The intrastate rate from the Ohio No. 8 district to Cleveland, Ohio, for example, had been reduced by 20 cents, or from $1.74 to $1.45.

[4] *Increased Freight Rates, 1948*, 276 I. C. C. 9.

[5] *Increased Freight Rates, 1951*, 280 I. C. C. 179; 281 I. C. C. 557; 284 I. C. C. 589.

280 I. C. C. 179, an increase of 2 percent, maximum 6 cents per net ton, was authorized in the rates on coal. The Public Utilities Commission of Ohio authorized a similar increase on March 22, 1951. In the report on further hearing therein, 281 I. C. C. 557, decided August 2, 1951, an increase of 6 percent, maximum 20 cents per ton, was authorized in lieu of the prior increase. The Ohio commission refused to permit a similar increase on intrastate coal traffic, and on February 15, 1952, it ordered the removal of the original increase of 2 percent. Later, after protracted hearings, the Ohio commission, on May 7, 1953, approved increases of 12 percent, maximum 40 cents per net ton, as authorized on interstate traffic in the report on second further hearing in Ex Parte No. 175, 284 I. C. C. 589, decided April 11, 1952, and on May 13, 1953, the increases in the intrastate rates became the same as the increases in the interstate rates to these northeastern Ohio destinations. The action of the Ohio commission was upheld by the Ohio Supreme Court on March 17, 1954. *Toledo Edison Co. v. Public Utilities Comm.*, 118 N. E. (2d) 531.

The Cleveland Electric Illuminating Company, called hereinafter the Illuminating Company, is engaged in the production, sale, and distribution of electricity for light, heat, and power purposes in Cleveland and adjacent territory. It also produces steam for heating purposes in the downtown business section of Cleveland. It operates four electric generating plants on the south shore of Lake Erie located at Avon Lake, Lake Shore (Cleveland), Willoughby (Eastlake), and Ceico, Ohio. Avon Lake, 8.3 miles east of Lorain, Ohio, and 18.4 miles west of Cleveland is served by The New York, Chicago and St. Louis Railroad Company, hereinafter called the Nickel Plate. Lake Shore is in the northern part of Cleveland, Willoughby (Eastlake) is 18.2 miles east of Cleveland, and Ceico is on a spur track 2.4 miles from Ashtabula. The latter three plants are served by The New York Central Railroad Company. The two steam generating plants are in Cleveland. One is served by The Baltimore and Ohio Railroad Company and the other by The Pennsylvania Railroad Company. All of the electric generating plants are large consumers of coal, requiring from 54 to 114 carloads a day for capacity operations.

Prior to 1950 the Illuminating Company received all of its coal requirements by rail. In that year it commenced using trucks to transport coal from Raymilton, Pa., near the northern border of the Butler-Mercer (Pennsylvania) district to its plant at Ceico, a distance of about 82 miles. The truck shipments aggregated 29,951 tons in 1950, 77,769 tons in 1951, 113,912 tons in 1952, and 144,924 tons in 1953. It also received 118,049 tons of coal by truck at its East-

lake (Willoughby) plant in 1953, some of which originated in the Leetonia and Middle districts of Ohio.

For some time the Illuminating Company had discussed with railroad officials the question of reductions in rail rates on coal to meet truck competition. The discussions were on a broad general basis, taking into consideration also the prospect of purchasing power from electric plants located nearer the coalfields, and the question of locating new powerplants, when needed, nearer the source of coal. Shortly after a meeting in December 1953, a reduction of 31 cents was proposed in the rail rate from Raymilton to Ceico, and that reduction was made on April 23, 1954. About a month and a half later the rail rate from Raymilton to Willoughby (Eastlake) was reduced a like amount. As a result of these reductions, the rate to both destinations became $2.36.

In the meantime, discussions had continued with respect to reduced rail rates to Avon Lake and Eastlake from Ohio mines in order to forestall the diversion of this traffic to trucks. The matter was considered by the responsible traffic officials of the principal rail carriers, and on April 12, 1954, the respondents decided to reduce their rates on fine coal [*] by 44 cents to Cleveland, Lorain, Avon Lake, and Willoughby (Eastlake), and to directly intermediate points that might be affected thereby, from origins in the Ohio No. 8, Middle, and Leetonia districts. Later, a similar reduction was authorized from Zelienople, Pa., and from the Cambridge and Crooksville districts in Ohio, the Moundsville and Fairmont districts in West Virginia, and the Pittsburgh, Connellsville, and Freeport districts in Pennsylvania.

In order to avoid departures from the long-and-short-haul provision of section 4 of the act, it was necessary to reduce the rates from the Butler-Mercer district to the Freeport basis, and from the Massillon (Ohio) district to the Middle-district basis. This resulted in a proposed reduction of 25 cents in the rates from the Butler-Mercer district and of 44 cents from Massillon.

The reductions of 25 cents from Butler-Mercer and 44 cents from the other districts were published to become effective on August 2, 1954. After they were filed, the rail lines received numerous requests for reductions from other origins and to other destinations. These requests were based in part on these proposed reductions and in part on a reduction of 35 cents a ton which the carriers had recently made in their lake-cargo rates on fine coal. See *Reduced Rates on Coal from the East to the Northwest*, 292 I. C. C. 119. The rail officials concluded

[*] Bituminous fine coal which will pass through a bar screen not exceeding 1.5 inches between bars or its equivalent, a 2-inch mesh, or a 2-inch round perforation.

that the matter should be given further consideration, and that the effective date of the proposed reductions should be postponed from August 2 to September 2, 1954. Special permission to make this postponement was obtained from us and the Ohio commission on July 29, 1954. However, on July 30 the Ohio commission rescinded its special-permission authority, and the reduced rates on Ohio intrastate traffic became effective on August 2. The proposed reductions on interstate traffic have been further postponed from time to time [7] over the protests of various interstate shippers. After the Ohio intrastate reductions became effective, the Nickel Plate,[8] which originates more coal in Ohio than any other rail carrier, refused to increase its rates voluntarily, and the other carriers were compelled to continue their reductions or otherwise lose substantial tonnage to the Cleveland area.

By petition dated September 7, 1954, certain railroads,[9] herein sometimes called the petitioners, alleged that the Ohio intrastate reductions result in a violation of the order entered herein on May 2, 1933, and requested us to enforce said order. On September 21, 1954, the proceeding was reopened for further hearing to determine whether the intrastate rates on bituminous coal from origins in Ohio to Cleveland, Lorain, Avon Lake, and Willoughby, and intermediate points, affect interstate rates on coal traffic in such a manner as to contravene (*a*) the requirements of the order of May 2, 1933, and (*b*) the provisions of section 13 (3) and (4) of the act. Evidence in support of increasing the intrastate rates to the level which existed on August 1, 1954, was adduced by the petitioners. The Illuminating Company, the city of Cleveland, the Ohio Coal Association, and the North American Coal Corporation are opposed to any increase. The Nickel Plate, although a nominal respondent, also opposes an increase. The interstate shippers seek the restoration of the differentials which previously existed, but generally they desire that this be done by reductions in the interstate rates.

*The issue as to the order of May 2, 1933.*—At the further hearing herein, the use of the prior record was limited to a determination of the issue described in (*a*) above; that is, whether the present intrastate rates contravene the requirements of the order of May 2, 1933, and this issue will be discussed first. That order, as indicated, required the carriers to establish and maintain intrastate rates no lower than

[7] They are now scheduled to become effective on June 1, 1956.

[8] Including The Lorain & West Virginia Railway Company.

[9] The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, the Erie Railroad Company, The Monongahela Railway Company, the Montour Railroad Company, The New York Central Railroad Company, the Norfolk and Western Railway Company, The Pennsylvania Railroad Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh & West Virginia Railway Company, The Virginian Railway Company, the Western Allegheny Railroad Company, and the Western Maryland Railway Company.

those in effect immediately prior to August 1, 1932. For example, on July 31, 1932, the rates from the Ohio No. 8 district were $1.51 to Akron, Ohio, and $1.74 to Cleveland. On the following day these respective rates were reduced to $1.28 and $1.45. In compliance with the order of May 2, the prior rates of $1.51 and $1.74 were reestablished on February 16, 1934, and the present rates are $2.45 and $2.63, respectively. The present rates obviously are no lower than the rates in effect on July 31, 1932, but it is argued that the order also required the establishment and maintenance of the differentials, interstate versus intrastate, that were in effect on that date.

Although the rates which became effective on February 16, 1934, resulted in restoring the differentials that existed on July 31, 1932, there is nothing in the order of May 2, 1933, specifically requiring that such differentials be maintained. In fact, the petitioners as well as the Nickel Plate have not applied the increases authorized in Ex Parte No. 175 to the intrastate rates from the Ohio No. 8 district to Akron, but have applied them to the rates from the interstate origins. With respect to this situation, the petitioners point out that the Nickel Plate included an exception in the Ex Parte No. 175 petition providing that the increases which might be authorized therein would not be applied to the intrastate rates to Akron and certain other destinations, and they urge that the order of May 2, 1933, should be read in the light of that exception. It seems apparent that if the petitioners could lawfully evade the order of May 2 and disrupt the so-called prescribed differentials between the intrastate and interstate rates to Akron by declining to apply the Ex Parte No. 175 increases to the intrastate rates, they could also lawfully remove the increases after they were established to either Akron, Cleveland, or any other Ohio destination.

In support of their contention that when the various general increases were applied to the interstate rates to Cleveland and other destinations in northeastern Ohio, the order of May 2, 1933, required corresponding increases in the intrastate rates so as to preserve the rate relationships, the petitioners refer to the decision of the Court of Appeals of New York in *Transit Comm.* v. *Long Island R. Co.*, 51 N. E. (2d) 668. That case is not in point. It involved an increase of 10 percent in the intrastate fares authorized by us in January 1942 See *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, 565. The increased fares, however, were less than we had previously prescribed in *Rates, Fares, and Charges of New York Central R. Co.*, 59 I. C. C. 290. See also *Increased Passenger Fares, Eastern Railroads*, 268 I. C. C. 457, 465.

It may be noted that after the Ohio commission denied an increase of 6 percent and ordered the removal of the previously authorized increase of 2 percent in the Ohio intrastate rates on coal, the peti-

tioners, in May 1952, filed an application with us requesting relief under section 13 of the act so as to require an increase in the Ohio intrastate rates to the same extent as authorized for interstate traffic in Ex Parte No. 175. No action has been taken thereon as the Ohio commission later authorized such increases, but the filing of the application indicates that the petitioners did not then consider that relief could be had under the prior order of May 2, 1933. Moreover, when seeking fourth-section relief in connection with the proposed interstate rates, they took note of the fact that the prior order remained in effect, but observed that the proposed rates were well above those prescribed in that order.

We conclude that the present intrastate rates on coal within Ohio do not contravene the requirements of the order of May 2, 1933.

*The section 13 issue.*—In 1953, Cleveland, Lorain, Avon Lake, and Willoughby received 12,114,211 net tons of track-delivery coal by rail, and 371,649 tons moved by rail to the intermediate points[10] affected by the 44-cent reduction. Based on the 1,178,000 tons of coal consumed at the Illuminating Company's plants at Avon Lake and Willoughby in 1953, the petitioners urge that their revenue loss would be less if that tonnage moved by truck and the remainder at the rates in effect on August 1, 1954, than if a reduction of 44 cents were applied to the remainder. For example, if it be assumed that the tonnage to Avon Lake and Willoughby moved at a rate equal to that from the Pittsburgh district of $3.19, the gross revenue loss from the diversion of that traffic to trucks would be $3,757,820. A reduction of 44 cents on the remainder of the traffic (11,307,860 tons) would decrease the revenue by $4,975,458, or $1,217,638 more than the loss of revenue on the traffic to Avon Lake and Willoughby. This does not take into consideration the savings in operating expenses that would result from not handling the traffic to Avon Lake and Willoughby, but it assumes that the remainder of the traffic would consist of fine coal and that all of it would continue to move by rail.

The petitioners take the position that the reduction to the Cleveland area cannot be confined to that area or to origins in Ohio, Pennsylvania, and northern West Virginia, but that it will spread throughout central territory and to the east and west thereof. They point out that from the Pittsburgh, Connellsville, and Fairmont districts, the destination group in which Cleveland, Avon Lake, Lorain, and Willoughby are located extends easterly along Lake Erie to Erie, Pa. To the Buffalo, N. Y., group the rates from the Ohio No. 8 and Cambridge districts are the same as from the Pittsburgh district. West of the Cleveland

[10] The intermediate points are those on the direct lines of the respondents to which reductions were made on August 2, 1954, such as Bedford, Elyria, Medina, and Wickliffe, Ohio.

area is the so-called affected territory which embraces northwestern Ohio, northeastern Indiana, and the Lower Peninsula of Michigan. Toledo, which is in affected territory, and Cleveland are the two largest industrial centers in northern Ohio. Because of competition between industries in these cities, the petitioners contend that it would be difficult to maintain a 44-cent reduction to Cleveland without making a similar reduction to Toledo. If the reduction were made to Toledo, they assert that it would spread throughout affected territory and to the west thereof. They note also that the rates from mines in southern West Virginia, Virginia, Tennessee, and eastern Kentucky, sometimes called the southern crescents, are the same to Toledo as to Cleveland, and state that if it should become necessary to reduce those rates to Cleveland because of origin competition, it would be necessary also to reduce them to Toledo or obtain relief from the long-and-short-haul provision of section 4 of the act, as some of the routes to Cleveland are through Toledo.

One of the principal reasons for the establishment and maintenance of an integrated rate structure on coal from the many producing districts in the Appalachian region to the various destinations in central territory is the highly competitive steel and allied industries which consume large quantities of coal for steam, metallurgical, and other purposes. Large iron and steel plants are located at Buffalo and Erie, in the Pittsburgh, Pa., Wheeling, W. Va., and Youngstown, Ohio, districts, at Canton, Cleveland, Massillon, Lorain, Mansfield, Toledo, Hamilton, Middletown, and Portsmouth, Ohio, at Detroit and Trenton, Mich., and in the Chicago district in Illinois and Indiana. The petitioners urge, therefore, that it would be economically undesirable to confine the 44-cent reduction to the Cleveland area from a few origin districts in Ohio, Pennsylvania, and West Virginia, and that probably this could not be done.

If the coal tonnage which moved into and through central territory in 1953, including the lake-cargo and ex-river movements, were subjected to a reduction of 44 cents a ton, the revenue losses would be $56,779,430. At the time of the further hearing herein the carriers were considering the restoration of the lake-cargo rates to the level which existed prior to the reduction in 1954, and if this were done [11] they would be higher in some instances than the track-delivery rates to the Cleveland area from the Ohio districts and the interstate dis-

[11] The prior rates were restored on August 1, 1955, resulting in rates from Ohio No. 8, Moundsville, and Fairmont to Lorain, for example, of $2.72, $2.76, and $2.98, respectively, when the coal is not transshipped to interior points after the water movement, and of $2.23, $2.26, and $2.46, respectively, when it is so transshipped. In addition, the carriers are considering other coal-rate reductions which have occurred since August 1950 in central and western trunkline territories with the object of determining whether it might be profitable to restore them to their former level.

tricts from which reductions have been published. If the lake-cargo tonnage is not considered, the direct and collateral revenue losses on the remainder of the 1953 tonnage, if subjected to a reduction of 44 cents, would be $37,002,522.

Various statistical data were submitted to show that the railroads are in no position to absorb the financial losses which the petitioners fear might flow from a continuation of the 44-cent reduction to the Cleveland area. For example, the rates of return on net property investment of the 4 principal Ohio coal carriers, the Baltimore & Ohio, the Pennsylvania, the Nickel Plate, and the New York Central, for the postwar years 1946 through 1953 ranged from 1.55 to 3.41 percent. For these and 9 other carriers, including the Chesapeake & Ohio, the Norfolk & Western, and the Virginian, the range was from 2.28 to 4.13 percent. It is pointed out that under our accounting regulations, expense accounts reflect normal depreciation charges, but tax accounts reflect accelerated writeoffs of the cost of defense facilities. This results in an overstatement of net earnings during the period of rapid amortization, the effect being a deferral of income taxes. If these tax deferrals were deducted from net operating income for 1953, the rates of return would be 2.92 percent for the 4 principal Ohio coal roads and 3.54 percent for all 13 carriers. For the first 8 months of 1954, as compared with the same months of 1953, the net railway operating income of the 4 Ohio carriers dropped from $145 million to $70 million, a decrease of 52 percent, and their net income declined from $97 million to about $10 million, or about 88 percent. For the 13 carriers, the net railway operating income declined 42 percent, and the net earnings 61 percent.

The production of coal in Ohio has increased substantially in the last 30 years. In 1932, the yield was 13,934,414 tons as compared with 34,112,748 tons in 1953, an increase of 144 percent. In the same period, the increase throughout the United States was 46 percent. The substantial increase in Ohio tonnage is due in part to the changeover from antiquated burning equipment to more modern burners. Much of the Ohio coal was not suitable for efficient use in the older burners, and this situation exists to some extent today.[12] Another reason is the great progress that has been made in washing and preparing coal for shipment, and an increase in the production from strip mining, which is a cheaper method than deep mining. About 60 percent of all Ohio coal is strip mined.

There has been a large increase also in the transportation of Ohio coal by trucks. Of the total shipments, the trucks transported

[12] The Illuminating Company, for example, has some old burning equipment at its Lake Shore plant for which it purchases low-ash coal from the southern crescents.



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2,746,957 tons or 13.4 percent in 1935, and 4,986,711 tons or 23.5 percent in 1940. In 1945, the truck tonnage increased to 5,307,988, but the percentage of the total shipments declined to 17.2 percent. However, in 1950 the trucks transported 10,235,682 tons, which represented 27.9 percent of the total, and in the first half of 1954 they hauled 4,377,579 tons or 31.6 percent. The rail carriers transported 17,322,579 tons of Ohio coal in 1935 and 25,523,956 tons in 1945, representing 84.5 and 82.5 percent, respectively, of the total shipments. In 1950 they hauled 25,539,640 tons, but this represented only 69.6 percent of the total shipments. In the first half of 1954 the rail carriers transported 8,400,066 tons or 60.7 percent of the total. Shipments by water increased from 906,628 tons or 2.5 percent of the total in 1950 to 2,213,062 tons or 6.6 percent in 1953. Shipments of Ohio coal by rail declined from 29,837,778 tons in 1947 to 21,634,231 tons in 1953, while shipments by truck and water increased from 6,904,569 to 12,134,377 tons in these respective years.

The petitioners attribute a large portion of the decline in rail shipments to the dieselization program of the railroads in recent years. For example, Ohio-mined rail fuel coal, excluding that of the Nickel Plate, was 9,093,890 tons in 1945, which declined to 4,939,802 tons in 1950 and to 2,531,847 tons in 1953. Coal for railway fuel purposes moves entirely by rail. Rail shipments of Ohio coal to Cleveland, Lorain, Avon Lake, and Willoughby rose from 1,329,145 tons in 1932 to 3,484,216 tons in 1953, an increase of 162 percent. As compared with 1945, the increase in 1953 was 51 percent. This clearly indicates, according to the petitioners, that there is no necessity for rate reductions to meet motor competition in the Cleveland area.

The Nickel Plate, which serves mines in the Ohio No. 8 and Middle districts, takes the position that the reductions are necessary to meet truck competition. It bases its position in part on what happened to the rail coal traffic from the Ohio mines to the Akron-Canton-Massillon areas. That traffic amounted to 1,988,423 tons in 1945. In 1949 it dropped to 841,911 tons, and in 1953 it was only 311,090 tons. The petitioners admit that most of the Ohio coal moving to the Akron-Canton-Massillon areas is transported by truck, but assert that this is due principally to the nearness of these areas to the coal mines in the Leetonia and Middle districts.

When the rail carriers filed their original petition in Ex Parte No. 175 the Nickel Plate did not regard truck competition as of sufficient importance to justify an exception thereto on coal traffic to the Cleveland area. However, a recent survey by this carrier shows that in the first 11 months of 1954 the trucks transported 310,445 tons to that area. Of this amount, 230,360 tons went to receivers equipped with rail sidings, including 72,000 tons to the Illuminating Company's plant

at Eastlake. The Nickel Plate's principal reason for opposing an increase in the intrastate rates is to prevent a further diversion of this traffic to the trucks. It is willing to join with other carriers in establishing reduced interstate rates from mines which compete with Ohio coal.

Coal moving to the Cleveland area is identified, according to use, as steam coal, coking or metallurgical coal, and special-purpose domestic coal. All of the coal produced in Ohio is known as steam coal, as it generally is not suitable for coking or other special purposes. The same is true of coal produced in the Butler-Mercer and Moundsville districts. The Moundsville coal seam is a continuation of the seam in Ohio No. 8, the two districts being divided by the Ohio River. Some coking coal is produced in the Fairmont district, but most of it is steam coal. This district produced over 42 million tons of coal in 1953, of which about 5 million tons were coking coal. Of the latter, 4,385,634 tons were produced by captive mines owned by steel mills which do not have plants in the Cleveland area, and the record indicates that none of the remainder moved to that area.

The steel mills in Cleveland and Lorain (none is in Avon Lake or Willoughby) obtain most of their coking coal from the southern crescents and the Pittsburgh, Freeport, and Belington districts, while most of the steam coal used in the Cleveland area comes from the Ohio districts and the Fairmont, Moundsville, and Butler-Mercer districts. In past years, the Pittsburgh district shipped substantial quantities of steam coal to the Cleveland area, but this movement has practically ceased. In 1953, only 4,599 tons of steam coal moved from the Connellsville district to Cleveland. Substantially all of the special-purpose domestic coal originates in the southern crescents. This coal is described as having special chemical and physical characteristics, such as very low sulphur content for use in the manufacture of malleable metals, and low-ash, high-fusion qualities for use in plants with antiquated burning equipment, and in homes and small business establishments.

In 1953, the steel mills in Cleveland and Lorain produced 4,715,000 tons of coke, which is equivalent to 6,695,300 tons of coal based on the use of 1.42 tons of coal for each ton of coke. This represents approximately 55 percent of the coal tonnage moved by rail to Cleveland, Lorain, Avon Lake, and Willoughby in that year. Special-purpose domestic coal moved by rail to these destinations in 1953 approximated 776,274 tons or about 6 percent of the total, and the steam-coal movement was 4,642,637 tons or about 39 percent.

The Illuminating Company is one of the largest consumers of steam coal in the Cleveland area, which is one of heavy industry. It furnishes electricity to more than 480,000 customers in an area of 1,700 square

miles and, in addition, supplies steam for heating purposes in downtown Cleveland. It purchased the following quantities of steam coal in the years indicated: 2,013,625 tons in 1946, 2,980,909 tons in 1947, 3,042,409 tons in 1948, 2,340,777 tons in 1949, 2,742,535 tons in 1950, 3,272,165 tons in 1951, 3,108,800 tons in 1952, 3,339,203 tons in 1953, and 2,568,657 tons in 1954. It expected to purchase about 2,617,000 tons in 1955. This includes coal used at Ceico (Ashtabula) which, although not involved in this reopened proceeding, is referred to because all of the powerplants are interconnected so that the electricity produced at any one can be distributed throughout the system.

The smaller tonnage in 1954 as compared with 1953 is due in part to the stockpiling of about 200,000 tons in 1953, and in part to the greater use of the plant at Eastlake (Willoughby) which is the newest and most efficient of the 4 plants. The Eastlake plant began operations in the latter part of 1953, and used only 249,540 tons in that year. In 1954 it used about 980,000 tons, and it was expected to use about 1,229,000 tons in 1955. This increase at Eastlake will decrease the tonnage to Ceico, Avon Lake, and Lake Shore. The Illuminating Company expects its tonnage to increase in 1957, and it predicts that its electric power output will double within 10 years. This does not mean, however, that the coal tonnage is expected to double, as the purchase of some power from other companies is anticipated.

Coal is the largest single item of expense in the production of electricity by the Illuminating Company. In 1953 it spent about $22 million for coal, of which about $10 million was for transportation charges. The delivered cost of coal represents about 75 percent and the transportation charges about 34 percent of its power-production costs. As indicated, the Illuminating Company received by truck 144,924 tons of coal at Ceico and 118,049 tons at Eastlake in 1953. Trucks were used for the transportation of 42,115 tons to Ceico in the first 4 months of 1954 and 63,892 tons to Eastlake in the first 6 months of that year. After the rates were reduced from Raymilton and the Ohio districts, the truck tonnage diminished considerably. If the Ohio rates are increased to their former level and the reduction from Raymilton is removed, it expects to use trucks for the transportation of about a million tons of coal in the first year. About one fourth of this tonnage would come from Raymilton and the Butler-Mercer district and the remainder from the northernmost Ohio districts, such as Middle and Leetonia. This first year would be regarded as a transitional period, after which the truck tonnage might be expected to increase.

The Illuminating Company's estimate as to the amount of coal that may be trucked to its plants is based in part on its past experience with truck shipments to Ceico and Eastlake. When it commenced using

truck transportation in 1950, the rail rate from Raymilton to Ceico was $2.38 and the truck rate was $2.56. Raymilton is the rail station for an off-rail mine, and as the cost of moving the coal from the mine to the rail car was 25 cents a ton, the truck rate resulted in a saving of 7 cents a ton as compared with the truck-rail movement. The truck rate is said to have been reduced to $2.46 after the lapse of 1 year and further reduced to $2.36 in October 1952. In the meantime, the rail rate was increased to $2.67 in May 1952 as a result of Ex Parte No. 175, and, as indicated, it was reduced to $2.36 in April 1954. The coal company which operates the mine near Raymilton furnished the truck transportation to Ceico. When the stated reductions in the truck rate were made, they did not result in reductions in the delivered price of the coal, as the coal company increased the mine price of the coal in the same amounts as, and coincident with, the stated rate reductions. The average rate on the coal which moved to Eastlake (Willoughby) by truck is stated to have been $2.80, but this coal was likewise transported by the coal companies which supplied the coal. In view of this type of operation, the stated truck rates cannot be accepted as a reliable guide as to the cost of transporting coal by truck. The record shows, for example, that numerous shipments of coal were received during the week ended September 5, 1953. Some of these shipments show a mine price of $4.05 a ton and a truck rate of $2.36, a total of $6.41, on coal which tested 12,700 B. t. u.'s (British thermal units). Others with the same B. t. u. testing show mine prices of $3.40 and $3.50 a ton with truck rates of $2.50 and $2.70, or totals of $5.90 and $6.20, respectively.

In addition to eliminating the cost of transferring the coal from the mine to the railhead at Raymilton when trucks were used for the through transportation to its plants, the Illuminating Company was able to reduce handling and dumping costs at its plants. At Ceico, for example, about 4 cents a ton was saved with the rail unloading equipment kept active, and it would be about 10 cents a ton if the handling equipment were placed on a standby basis. No item is mentioned, however, for the cost of maintaining the truck-unloading equipment. There would also be a saving of 1 cent a ton for demurrage based on the Illuminating Company's experience in the last 9 years.

The trucking of a million or more tons of coal to the Illuminating Company's plants would require an entirely different type of operation than that heretofore performed. The company would either purchase the trucking equipment and perform the trucking itself or arrange to have the trucking done by a reputable trucking company. It has had several studies made with respect to the costs of truck transportation. One study was made by a trailer manufacturer and indicates a cost of $2.54 a ton from Cadiz, in the Ohio No. 8 district, to Avon Lake, about 125 miles. It is based on 2 round trips a day for 300 days a year, with

depreciation of 5 years on the tractor and 8 years on the trailer. Another study, made by a tractor manufacturer, indicates a cost of $3 a ton for a haul of 120 miles, based on 3 round trips a day for 240 days a year, with depreciation of 2 years on the tractor and 4.5 years for the trailer. Neither of these studies shows any item for profit. Another study is based on calculations made by members of our staff as to the cost of transporting iron and steel in 1953 in eastern territory. It indicates costs of $2.13 a ton for 80 miles, $2.66 for 100 miles, and $3.18 for 120 miles, based on 20 minutes for loading and unloading. It includes no profit item, and there is no indication that the costs of transporting iron or steel are comparable to the costs of hauling coal.

One cost study, and perhaps the most significant, was made by a large trucking company of the type which might be employed by the Illuminating Company to haul its coal. It shows costs, including items for management, administration, and profit, of $1.82 a ton for 60 miles, $2.45 for 80 miles, $2.75 for 100 miles, and $3.12 for 120 miles, based on loads of 23 tons. The 60-mile hauls contemplate 4 round trips a day, with 2 drivers for each unit. For the hauls of 80, 100, and 120 miles, 3 round trips a day are contemplated for each unit, with either 2 or 3 drivers for the 80-mile haul and 3 for the other hauls. All of the data are based on the use of the trucking equipment 240 days a year, but the statement is made that it could be used at least 300 days a year.

The petitioners make certain criticisms of, and revisions in, the data mentioned in the last study. First, they state, through an expert witness, that it would be practically impossible to attain a 240-mile round trip in each of the three 8-hour shifts in connection with the haul of 120 miles. This is based on 1 hour for loading and unloading and 30 minutes for lunch, whereas the study is based on 10 minutes for loading and 5 minutes for unloading. Based on the weight of a diesel tandem tractor and a hopper trailer weighing 28,620 pounds, the petitioners show that it would be impossible to transport 23 tons of coal without exceeding the Ohio State weight limit of 70,000 pounds. The study, however, contemplates the use of a gasoline tractor weighing about 11,750 pounds and a so-called newly designed aluminum trailer weighing about 10,000 pounds. Even with the use of the lighter equipment, however, only about 19 tons could be transported from Pennsylvania without exceeding the Pennsylvania State weight limit of 60,000 pounds.[13] Moreover, the rate of $3.12 for a 120-mile haul, which is approximately the distance from the northern mines in the Ohio No. 8 district to the Cleveland area, exceeds the prior rail rate of $3.07 from that district to Cleveland, and, as later shown, the record clearly indicates that it is not feasible to transport coal by truck from the Ohio No. 8 district to the Cleveland area.

[13] On July 1, 1955, after the hearing herein was closed, the weight limit in Pennsylvania was increased from 45,000 to 60,000 pounds, as stipulated by the parties.

The petitioners contend that the interstate rates to the Cleveland area are reasonable when judged by their history, their prior approval by this Commission, and comparisons with other rates on coal in the same general territory. For example, to Cleveland from the Pittsburgh district, the so-called base district, the present rate of $3.19 yields revenue of 18.79 mills per ton-mile for an average distance of 169.8 miles. This same rate is applicable from the Pittsburgh district to Oil City, Pa., 164.5 miles, and to Erie, 199 miles, which produces ton-mile revenues of 19.39 and 16.03 mills, respectively. From the Reynoldsville district to Buffalo, 208.2 miles, the present rate of $3.57 yields revenue of 17.15 mills per ton-mile. The latter rate was found not shown to be unreasonable by division 2 in *Rochester & Pittsburgh Coal Co.* v. *Baltimore & O. R. Co.*, 294 I. C. C. 423, decided March 10, 1955.

It is urged by the petitioners that the Ohio intrastate rates prior to August 2, 1954, to the Cleveland area did not exceed a just and reasonable level, and that the present intrastate rates create unjust discrimination against interstate commerce. In support thereof, they refer to the fact that the Ohio commission approved the prior rates, which action was upheld by the Supreme Court of Ohio, and to the revenue loss of $1,519,554 based on the 1953 tonnage to Cleveland, Avon Lake, Lorain, and Willoughby, and the much greater potential loss which may flow from the reduced rates.

The record shows that the conditions incident to the intrastate transportation of coal to northeastern Ohio are not more favorable than the conditions incident to the interstate transportation of coal to that area, and none of the parties contends otherwise. The Illuminating Company, however, and others who introduced evidence in opposition to an increase, urge that the reduced intrastate rates are compensatory and reasonable, and do not create unjust discrimination against interstate commerce.

Using the so-called 23922 scale originally prescribed in *Coal Trade Assn. of Indiana* v. *Baltimore & O. R. Co.*, 185 I. C. C. 225, as modified on reconsideration, 190 I. C. C. 743, and as later adjusted in *Coal to Beloit, Wis., and Northern Illinois*, 263 I. C. C. 179, hereinafter called the original and modified scales, as common denominators, the Illuminating Company compares the reduced intrastate rates with others prescribed or found lawful in other proceedings. From the Middle district to Cleveland, 92.6 miles, the original and modified scales, with subsequent general increases added, produce rates of $2.32 and $2.39, respectively, as compared with the present rate of $2.36. From the Ohio No. 8 district to Cleveland, 128.2 miles, the scale rates would be $2.59 and $2.67, and the present rate is $2.63. From the Pittsburgh district to Youngstown, 101.3 miles, the present rate is $2.39, which is

the equivalent of a rate of $1.37 prescribed in *Bituminous Coal to Youngstown District*, 263 I. C. C. 683, with subsequent increases added, and the original and modified scales would result in rates of $2.42 and $2.49 for this distance. For 95 miles, the distance used in prescribing the rate of $1.37, the modified-scale rate is $2.39, or the same as the present rate to Youngstown. In *Intrastate Coal Rates to Northern Illinois*, 283 I. C. C. 271, we found the intrastate rates from Illinois mines to 43 destinations in northern Illinois not shown to be unlawful under section 13 of the act. Those rates, with subsequent increases added, average 88 percent of the modified scale from Fulton-Peoria, the base group in Illinois. To the same destinations, the rates from the Brazil group, the base group in Indiana, average 94 percent of the modified scale.

Most of the Ohio intrastate rail shipments of coal to the Illuminating Company in 1953 moved for distances between 100 and 150 miles. Based on a 1-percent sample thereof, the average distance was 131.8 miles and the average revenue $3.05 a ton. If the revenue were reduced by 44 cents a ton, the average would be $2.61. This revenue is compared with the average of $2.52 a ton for an average haul of 125.6 miles on interstate shipments to and from Ohio (other than lake-cargo coal), based on a 1-percent sample of all such shipments.

The Illuminating Company attempted to show the cost of transporting coal by rail to the Cleveland area by use of what is commonly called Rail Form A. The costs were constructed on an out-of-pocket basis, reflecting 80 percent of operating expenses, rents, and taxes, including a 4-percent return on the value of equipment and 2 percent on investment of road as of January 1, 1954, but not including the operation of coal and ore wharves or loss and damage payments. The formula was applied individually to the 1953 operations of seven of the respondents and collectively to the carriers in the Pocahontas region. Using the Illuminating Company's 1953 coal traffic as a base, the study shows that the ratio of revenue to cost on intrastate traffic is 160 percent at the reduced rates and on interstate traffic 156 percent. Based on that company's traffic for August and September 1954, the ratios are 162 percent intrastate and 148 percent interstate. For the average short tariff route distances the ratios from the individual districts are 180 percent from Massillon, 75 miles, 167 percent from Middle, 92 miles, 161 percent from Ohio No. 8, 128 miles, 140 percent from Crooksville, 170 miles, 137 percent from Cambridge, 176 miles, 167 percent from Butler-Mercer, 100 miles, 164 percent from Moundsville, 150 miles, 165 percent from Pittsburgh, 162 miles, 145 percent from Fairmont, 247 miles, and from 154 to 113 percent from the southern crescents, 292 to 520 miles. Other ratios are shown based

on system average cost patterns applied to all interstate coal traffic to and from Ohio (excluding lake cargo). These data indicate that interstate traffic as a whole produces revenues which exceed costs by 35 percent.

The Illuminating Company admits that the cost data used in the comparisons are not based on actual costs associated with the services performed and do not have the accuracy necessary for a fair approximation of the actual costs incurred from the various origin districts, as many assumptions had to be made. This, it is explained, is due to its inability to obtain from the respondents data wholly within their possession. It contends, however, that the cost figures are helpful, as common denominators, to show that the reduced intrastate rates make a better relative contribution to revenues than do the interstate rates. It is of course recognized that cost is only one of a number of important elements to be considered in determining the lawfulness of rates, and that rates on coal are not generally made on a mileage basis but are related to one another by group differentials which usually reflect competitive needs more than distances.

From mines served by the Nickel Plate, the rate of $2.36 from the Middle district produces respective car-mile and ton-mile revenues of $1.375 and 22.9 mills to Cleveland, 103 miles, $1,348 and 22.5 mills to Lorain, 105 miles, $1.25 and 20.8 mills to Avon Lake, 113.3 miles, and $1.161 and 19.3 mills to Willoughby, 122 miles, based on 60 tons per car; and from the Ohio No. 8 district the rate of $2.63 to these destinations produces revenues ranging from $1.115 to $1.013 per car-mile and from 19.2 to 16.9 mills per ton-mile for distances ranging from 136.8 to 155.8 miles. The average distances from all of the rail mines in those districts to the Cleveland area are less than the distances over the Nickel Plate, and the average earnings would be correspondingly greater.

The Nickel Plate urges that the petitioners' estimated loss of revenue is exaggerated even when consideration is limited to the 1953 coal traffic to Cleveland, Lorain, Avon Lake, and Willoughby. Of the 12,114,211 tons which moved to those destinations in 1953, 5,429,355 tons originated in the southern crescents. Practically all of the latter was coking coal, and that which was used for steam purposes was in the nature of special-purpose domestic coal. If the southern tonnage is deducted from the total, the remainder is 6,684,856 tons. Applying the 44-cent reduction to the latter tonnage results in a revenue loss of $2,941,336, which is less than the revenue from 1 million tons at the average rate of $3.05 paid by the Illuminating Company or at the rate of $3.07 previously in effect from the Ohio No. 8 district to the Cleveland area.

Substantially all of the coal which moved from the Pittsburgh and Freeport districts to the Cleveland area in 1953 was coking coal, the exception being 23,878 tons of captive steam coal from Pittsburgh to Lorain. If all of the tonnage from these 2 districts (2,022,724 tons), together with the southern tonnage, is deducted from the total to the Cleveland area, the remainder is 4,662,132 tons. Applying the reduction of 44 cents to the latter results in a revenue loss of $2,051,338, which is less than the revenue from 1 million tons at the Ohio No. 8 rate of $3.07 or the rate of $2.80 from the Middle-Leetonia districts.

In 1953 the Ohio No. 8, Cambridge, Middle, Leetonia, Massillon, and Crooksville districts (the Ohio districts from which the reduced rates apply) shipped by rail 3,423,755 tons of coal to Cleveland, Lorain, Avon Lake, and Willoughby. If the 44-cent reduction had been in effect at that time, the rail revenues would have been reduced by $1,506,452. However, the diversion of 1 million tons of coal from rail to truck would have resulted in a revenue loss of $1,293,548 under the rate of $2.80, and of $1,563,548 under the rate of $3.07. The 44-cent reduction on 3,423,755 tons would have been offset by a diversion of 538,018 tons to trucks based on the rate of $2.80.

Although the Illuminating Company indicates that it might truck some coal from the northern part of the Ohio No. 8 district if the rates are increased, the record is persuasive that it is not feasible to truck from that district to the Cleveland area. The company's past experience in truck transportation within Ohio has been confined largely to shipments originating in the Middle and Leetonia districts. It received 455 tons by truck from the Ohio No. 8 district in 1953, but this apparently was an experimental venture, and none moved therefrom by truck in 1954. A witness for a company which owns and operates 3 deep mines and 2 strip mines in the Ohio No. 8 district, stated that some experimental shipments made by truck to northeastern Ohio were unprofitable. Another witness, connected with a company which produced about 5 million tons at the so-called Georgetown mine in Ohio No. 8, stated that it is not considered practical to truck coal from that district to the Cleveland area; and another witness, with extensive experience in the sale of coal in the Cleveland area, gave similar testimony with respect to coal produced by his company at Blaine in Ohio No. 8. The distances to the Cleveland area are greater from the Cambridge and Crooksville districts than from Ohio No. 8, and no one contends that truck shipments have moved or will move from those two districts to the Cleveland area.

The highway distances from mines in Columbiana, Stark, Carroll, and Tuscarawas Counties in the Leetonia and Middle districts to Eastlake (Willoughby) range from about 64 to 89 miles, and average about 80 miles. A survey of record indicates that as of January 1,

1950, there were 619,700,000 tons of recoverable primary [14] coal reserves in these counties, of which 16,202,000 tons are shown as strip-mine reserves in Columbiana and Tuscarawas Counties. The petitioners point out that over 9 million tons of strip coal were produced in the latter counties in 1951, 1952, 1953, and the first 9 months of 1954, leaving slightly over 7 million tons, which, at the 1953 rate of production, would be exhausted in less than 3 years. This, they urge, would prevent the Illuminating Company from obtaining the cheaper mined strip coal from these counties for any substantial period of time. That the survey may be understated is indicated by the fact that it shows no primary reserves and only 1,513,000 tons of secondary reserves in Stark County, Ohio, yet this county produced 999,728 tons in 1950, 950,923 tons in 1951, 901,942 tons in 1952, and 971,868 tons in 1953. The evidence shows 30 mines in Columbiana, Stark, Carroll, and Tuscarawas Counties, with a 1953 production ranging from 27,878 to 533,291 tons. Eight of these mines shipped by rail and truck, and the remainder shipped by truck only, but the destinations of these shipments are not shown.

From the Butler-Mercer district the distances are about 68 miles to Ceico and 85 miles to Eastlake from Mercer County, and about 82 miles to Ceico from Lawrence and Venango Counties. Mercer and Lawrence Counties have indicated reserves of about 685 million tons of recoverable coal. Apparently some coal may be trucked from these counties to Ceico and Eastlake, but no cost studies have been made by the Illuminating Company for such transportation. Since only about 19 tons could be hauled lawfully in one trucking unit [15] under the Pennsylvania weight limits, it seems obvious that the cost per ton would be greater from the Butler-Mercer district than from origins in Ohio.

Coal production in the principal counties in the Leetonia and Middle districts rose from 3,649,461 tons in 1945 to 6,503,652 tons in 1953. Considering the indicated recoverable reserves in these districts, it is apparent that they could supply the Illuminating Company with substantial quantities of coal for many years.

There is keen competition in the steam coal market in the Cleveland area between Ohio producers and interstate shippers, particularly those in the Fairmont-Moundsville districts. In past years, those districts furnished a substantial amount of the steam coal purchased by the Illuminating Company. Their participation in that traffic rose

[14] These reserves are further described as measured, indicated, and inferred. "Measured" is based on out-crops, trenches, and drill holes; "indicated" in part on measured and in part from projection of visible data for about 1 mile; and "inferred" largely from estimates based on broad general knowledge of the geological character of the bed or region.

[15] This assumes that the lighter equipment contemplated by the Illuminating Company could be successfully used.

from 845,722 tons or 42 percent in 1946 to 1,451,282 tons or 62 percent in 1949. It dropped to 49 percent in 1950, and was 38 percent in 1951, 31 percent in 1952, 29 percent in 1953, and 20 percent in 1954. That company's tonnage from the Leetonia, Middle, Cambridge, and Ohio No. 8 districts increased from 819,271 tons or 35 percent of the total in 1949 to 1,861,681 tons or 72.5 percent in 1954. Most of this tonnage originated in the Ohio No. 8 district. The increase in the tonnage from the Fairmont-Moundsville districts prior to 1950 is attributed to the general demand for coal and a shortage of rail cars.

To Cleveland (not including Lorain, Avon Lake, and Willoughby), the tonnage as a whole from the Fairmont district shows a pattern somewhat similar to that purchased by the Illuminating Company. This traffic amounted to 799,250 tons in 1946, 920,476 tons in 1949, 835,250 tons in 1950, 968,863 tons in 1951, 534,268 tons in 1952, and 463,228 tons in 1953. The tonnage from the Butler-Mercer district to Cleveland has shown a rather steady increase. It was 16,782 tons in 1946, 92,149 tons in 1949, 113,794 tons in 1950, 129,784 tons in 1951, 127,802 tons in 1952 and 163,591 tons in 1953. The coal production in the Butler-Mercer district was 49 percent greater in 1953 than in 1923, whereas the national production declined from 100 to 80.2 percent during that period. The Butler-Mercer shippers are primarily interested in regaining or retaining the differential relationship which has existed generally between the rate from that district and the rates from other districts to the Cleveland area. The present rate from the Butler-Mercer district to Cleveland is $3, or 19 cents less than that from the Pittsburgh district and 7 cents less than the prior rate of $3.07 from Ohio No. 8.

The Clarksburg Coal Freight Association is a voluntary association of coal producers who operate 17 coal mines in the Clarksburg area of the Fairmont district, with an annual output of about 5 million tons of coal. Prior to September 1, 1949, the Fairmont rate to Cleveland was 25 cents higher than Ohio No. 8 and 47 cents higher than from the Middle district. On that date, as a result of Ex Parte No. 168 increases, the respective differentials became 27 and 51 cents, and these were further increased to 30 and 57 cents on May 13, 1953. The present differentials, as a result of the 44-cent reduction within Ohio, are 74 and 101 cents, respectively. The Cleveland area has always been a major market for the steam coal produced by these operators, and they have invested more than $20 million in their mining properties since 1932. Even before the 44-cent reduction became effective in Ohio they lost some business in the Cleveland area by reason of truck transportation, and under the present rate differentials they assert it is impossible to continue shipping to that area. They point out that truck compe-

tition is just as damaging to them as to the Ohio operators who ship by rail, and contend that the only just and reasonable way to correct this situation is to apply the 44-cent reduction to the Fairmont rate.

A company which owns and operates a mine at Cassville, W. Va., in the Fairmont district has a production capacity of 5,000 tons daily, and reserves of about 40 million tons. It has an investment of about $4 million in this mine, which is fully mechanized and equipped with a modern washing and air-cleaning plant. For many years this company has shipped a large tonnage of coal to the Cleveland area. Beginning in July 1953, that tonnage began to decrease, and in the first 7 months of 1954 it was 43 percent less than the monthly average in the last 6 months of 1953. On and between January 1 and July 31, 1953, it shipped 125,000 tons of steam coal to the Cleveland area, and for the same period in 1954 the shipments totaled 61,800 tons, a loss of 63,200 tons. This loss is attributed to truck competition, and its tonnage suffered an additional drop after the 44-cent reduction became effective on August 2, 1954. It asserts that it is suffering irreparable losses under the present rate bases, and urges that the only logical solution to the problem is to extend the 44-cent reduction from Fairmont to the Cleveland area.

Another company, with 3 mines in the Moundsville district and 1 in the Fairmont district, has lost business in the Cleveland area since the 44-cent reduction became effective. Prior to August 2, 1954, the rate from the Moundsville district to Cleveland was the same as the rate from the Ohio No. 8 district, as a result of the decision in *Coal from West Virginia to Northeastern Ohio*, 220 I. C. C. 333, decided March 8, 1937, and the rate to Willoughby was placed on this same basis on May 17, 1954. From Moundsville to Avon Lake and Lorain the rate is the same as from the Pittsburgh district; namely, $3.19. This company has experienced difficulty in selling in the Cleveland area in competition with Ohio coal under the differentials which previously existed, and it expects to lose all of its traffic to that area unless it receives a reduction of 44 cents also from its mines.

The impact of the 44-cent reduction within Ohio is compared with what occurred when a lesser reduction of 29 cents a ton was made in 1932. That reduction remained in effect during 1933 when the Ohio tonnage to Cleveland was 42.3 percent of the total as compared with 29.7 percent in 1932, and the interstate shipments from the northern mines dropped from 38.4 to 30.6 percent of the total. In August, September, and October, 1953, the Ohio tonnage to Cleveland, Lorain, Avon Lake, and Willoughby was 52.3 percent of the total, and this rose to 68.2 percent in the same months of 1954. In these same respective months, the portion shipped from the northern interstate mines declined from 47.7 to 31.8 percent.

Counsel for certain of the interstate shippers and associations insist that we may, in this proceeding, require a reduction in the interstate rates, at least to the extent of 44 cents a ton, to remove any undue preference and prejudice which may be found to exist between intrastate and interstate shippers and localities. They point out, and the record shows, that the natural tendency will be for the consumers in the Cleveland area to reduce further their purchases of steam coal from the higher rated interstate districts if the Ohio rates are increased to their former level, thereby creating a more serious source of injury to them than to the Ohio shippers. They refer to the statement in the original report herein (at page 443) that the major question presented is the relationship between State and interstate rates, and as the competitive situation is more forceful today, they urge that the relationship is still of prime importance. No one has contended here that the prior differentials, as such, are unlawful in any respect, and they insist that this record requires the restoration of those differentials by reductions in the interstate rates.

In support of their position, these counsel refer, among others, to the so-called Shreveport case, *Houston, E. & W. T. Ry. Co.* v. *United States*, 234 U. S. 342, wherein the Supreme Court stated:

> Manifestly the order might be complied with, and the discrimination avoided, either by reducing the interstate rates from Shreveport to the level of the competing intrastate rates, or by raising these intrastate rates to the level of the interstate rates, or by such reduction in the one case and increase in the other as would result in equality.

They admit that the order in that case was alternative in its requirements, but it is argued that section 13 (3) and (4) further implemented the law by authorizing us to remedy situations of this nature by either increasing the intrastate rates or reducing the interstate rates. They point out that upon finding unlawful prejudice or discrimination, section 13 (4) provides that we "shall prescribe *the* rate, fare, or charge, or the *maximum* or minimum, or *maximum* and minimum thereafter to be charged * * *" [Italics supplied.] They urge that *the* rate relates to interstate as well as intrastate traffic, and that we would never have occasion to prescribe a maximum intrastate rate. Thus, it is argued, we have the authority to prescribe maximum interstate rates in this proceeding.

We agree that the relationship between State and interstate rates is a primary consideration here, but we do not agree that, under the issues in this reopened proceeding, we may order a reduction in the interstate rates. Whether or not in a section 13 (3) proceeding, where the issue as to the interstate rates is squarely raised and tried, maximum interstate rates may be prescribed by us under the powers conferred upon this Commission in that section of the act, need not here

be determined. At the further hearing herein, the examiner plainly stated, in response to inquiries from counsel, that in his opinion the interstate rates as such were not in issue. The record shows that prior to August 2, 1954, the differentials between the various producing districts, interstate and intrastate, had been in effect generally, with only slight changes or modifications, for more than 30 years, and that some of the interstate shippers are suffering a severe disadvantage in attempting to compete in the Cleveland area under the present adjustment, but they made no attempt to show that the interstate rates exceed a maximum reasonable level.

*Discussion and conclusions.*—The coal produced in Ohio is what is commonly known as steam coal, which generally is not suitable for coking and other special purposes. The reduction in the rates from the Ohio origins to the Cleveland area (and from Raymilton to Ceico) was for the purpose of meeting actual and potential truck competition. This competition does not exist as to coal suitable for coking and other special purposes. There appears to be no competitive reason, therefore, for a reduction in the rates on coking and other special-purpose coal.

The Illuminating Company suggests that from a truck- and market-competitive standpoint, reduced rates could be confined to the Ohio districts and the Fairmont, Moundsville, and Butler-Mercer districts to the Cleveland area. If this were done, the loss in rail revenue, based on the 1953 tonnage from these districts to Cleveland, Lorain, Avon Lake, and Willoughby and a reduction of 44 cents a ton, would be less than the revenue loss from the diversion of 1 million tons of coal to trucks at the rate of $2.80 from the Middle and Leetonia districts. The petitioners contend, however, that the reduction could not be so confined. They assert that if a reduction were made from the Fairmont and Moundsville districts, the shippers in the Pittsburgh, Connellsville, and Freeport districts would insist on similar treatment, which would lead to requests for similar reductions from the southern crescents.

We are inclined to agree with the petitioners. There are large reserves of coal in the Pittsburgh district, particularly in Washington County, Pa., which may be used for steam purposes, and this district formerly supplied substantial quantities of steam coal to the Cleveland area. The fact that this movement has practically ceased, does not necessarily indicate that it will not be renewed in the future if the rates therefrom are properly related to those from other districts. The Connellsville district also produces steam coal and shipped 4,599 tons in 1953 and 3,283 tons in the first 6 months of 1954 to the Cleveland area. The rates to Cleveland from the Pittsburgh and Connellsville districts are 18 and 10 cents respectively, less than the rate from

the Fairmont district, but if the Fairmont rate were reduced by 44 cents a ton without a similar reduction from the Pittsburgh and Connellsville districts the rates from the latter districts would be 26 and 34 cents, respectively, higher than from Fairmont.

Another element that may not be overlooked is the fact that Fairmont produces a substantial amount of coking coal, and the rates on coal may not be based solely on the use to which it is put. Although most of this coal is produced in captive mines owned by steel companies outside the Cleveland area, and none of the remaining production was shipped to the Cleveland area in 1953, the situation may change if the rate therefrom to Cleveland were made 26 cents less than the rate from the Pittsburgh and Freeport districts. Such action undoubtedly would be followed by requests for reductions in the rates from the southern crescents, which ship millions of tons of coking coal annually to Cleveland and Lorain.

The shippers in the southern crescents are also apprehensive that the present adjustment may cause some plants that now use southern coal to remodel or replace their coal-burning equipment so that it would be more economical to use Ohio coal, thereby depriving them of their market for so-called special-purpose domestic coal. Although this may happen in any event, it seems logical that the present adjustment would hasten such action.

There has been a substantial increase in the amount of Ohio coal transported by trucks in recent years, but it is not shown that there has been a similar increase in such transportation to the Cleveland area. The record shows a steady increase in the rail shipments of Ohio coal to Cleveland. From the Ohio No. 8, Cambridge, Middle, Leetonia, and Crooksville districts these shipments increased from 1,702,798 tons in 1950 to 2,282,252 tons in 1953.

The Illuminating Company's experience in the receipt of coal by truck has been confined to that which was transported by the coal producers. As herein stated, the indicated rates charged on these shipments cannot be accepted as a reliable guide as to the cost of such transportation, although it is noted that the average rate said to have been charged on the truck shipments from the Middle-Leetonia districts is $2.80, which is the same as the prior rail rate from those districts to the Cleveland area. The cost studies relied on by the Illuminating Company as indicating the cost of truck transportation to the Cleveland area vary widely, and some of them appear to have been prepared by companies which have never engaged in such transportation. The study which appears to be the most significant is based on the use of a so-called newly designed aluminum trailer which, with the type of tractor contemplated, would permit the transportation of 23 tons of coal without violating the Ohio State weight laws. Such a

trailer, however, has never been tested, and, so far as appears, it is merely in the blueprint stage.

On this record, we are not convinced that an increase in the intrastate rates to their former level would cause a diversion of traffic to the trucks to such an extent that the respondents would suffer a greater loss in revenue than would result from maintenance of the present rates.

There is keen competition in the sale of steam coal in the Cleveland area between the Ohio districts from which the reduced rates apply and some of the interstate districts, particularly the Fairmont, Moundsville, and Butler-Mercer districts, and the shippers in the latter districts have been adversely affected by the wide spread between the intrastate and the interstate rates to the Cleveland area. There is no truck competition from the interstate districts or the Ohio No. 8, Cambridge, and Crooksville districts to the Cleveland area. There is some truck competition from the Middle and Leetonia districts, but it is indicated that it is not of sufficient severity to warrant different treatment of the rates from those districts and the rates from the other districts.

Except for the addition of general increases authorized by this Commission and the Ohio commission, the interstate and the intrastate rates on bituminous coal to the Cleveland area generally have been in effect for many years, and, with only slight variations, this is likewise true of the differentials and rate relationships which existed between such rates on August 1, 1954. The intrastate rates that were in effect on that date were approved by the Ohio commission.

We conclude that:

1. The present intrastate rates on bituminous fine coal, in carloads, from origins in Ohio to Cleveland, Lorain, Avon Lake, and Willoughby, and affected intermediate points, do not contravene the requirements of the order entered herein on May 2, 1933.

2. The conditions incident to the intrastate transportation of coal from origins in Ohio to the destinations mentioned in finding 1 are not more favorable than the interstate transportation of coal from origins in adjoining States to the same destinations.

3. The interstate rates and charges on coal from adjoining States to the destinations mentioned in finding 1 are reasonable.

4. The intrastate rates here in issue from the Ohio No. 8, Middle, Leetonia, Cambridge, and Crooksville districts to the destinations defined in finding 1 are, and for the future will be, unduly preferential of Ohio shippers and localities and unduly prejudicial to interstate localities and shippers of bituminous fine coal from origin districts in Pennsylvania and West Virginia, particularly the Moundsville and Fairmont districts, to the same destinations.

5. The intrastate rates here in issue from the Ohio districts named in finding 4 to the destinations mentioned in finding 1 are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient service and to operate profitably, and are causing unjust discrimination against interstate commerce.

6. The undue preference and prejudice and unjust discrimination found to exist should be removed by increasing the intrastate rates in issue from the Ohio No. 8, Middle, Leetonia, Cambridge, and Crooksville districts to the destinations mentioned in finding 1 to the level which existed from these districts to the said destinations on August 1, 1954.

7. The establishment of the increased intrastate rates as provided in finding 6 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, and will result in increases in the respondents' revenues.

An appropriate order will be entered.

CHAIRMAN ARPAIA and COMMISSIONER TUGGLE concurred in the result.

COMMISSIONER FREAS dissents.

COMMISSIONER MURPHY did not participate in the disposition of this proceeding.

## APPENDIX C

### Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of March, A.D. 1956.

No. 25566

INTRASTATE RATES ON BITUMINOUS COAL WITHIN OHIO

This proceeding having been further heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report on further hearing containing its findings of fact and conclusion thereon, which report, together with the prior report, 192 I.C.C. 413, is hereby referred to and made a part hereof; and the Commission having found in said report on further hearing that the intrastate rates charged for the transportation of bituminous fine coal, in carloads, from origins in the Ohio No. 8, Middle, Leetonia, Cambridge, and Crooksville districts in Ohio to Cleveland, Lorain, Avon Lake, and Willoughby, Ohio, and affected intermediate points, cause unjust discrimination against interstate commerce and undue and unreasonable preference of and advantage to intrastate shippers and localities, and subject interstate shippers and localities in Pennsylvania and West Virginia, particularly in the Fairmont and Moundsville districts in West Virginia to undue and unreasonable prejudice and disadvantage:

*It is ordered*, That the respondents herein, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 28, 1956, and thereafter to abstain, from practicing the unjust discrimination and undue preference and prejudice referred to in the next preceding paragraph hereof.

*It is further ordered*, That said respondents, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before June 28, 1956, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Inter-

state Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the unjust discrimination and undue preference and prejudice referred to in the first paragraph hereof, by the reestablishment of the intrastate rates which were in effect on August 1, 1954, from the Ohio origin districts and to the destinations mentioned in the first paragraph hereof.

*And it is further ordered,* That this order shall continue in force until the further order of the Commission.

By the Commission.

HAROLD D. MCCOY,
*Secretary.*

(SEAL)

APPENDIX D

## APPENDIX D

### Interstate Commerce Act (49 U.S.C.)

Sec. 13 (3). Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship beween rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

Sec. 13 (4) Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or

order of any State authority to the contrary notwithstanding.

Sec. 15 (1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property, as defined in the section 1 of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

Sec. 15(a)(2) In the exercise of its power to prescribe just and reasonable rates the commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

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## CITATIONS


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Ohio to restore to their August 1, 1954, level the in trastate rates on bituminous coal transported by ra from eastern Ohio mines to destinations at Clevelan and other points in northeastern Ohio. *Intrastat Rates on Bituminous Coal Within Ohio,* 298 I. C. C 85 (March 5, 1956).

*Background and Nature of the Case.* For many years prior to August 1, 1932, the intrastate rates o coal from the mining districts in eastern Ohio to des tinations in northeastern Ohio were integrated b fixed differentials with the interstate rates from min ing districts in Pennsylvania and West Virginia to th same destinations (298 I. C. C. at 86). These differ entials were disrupted by the reductions in the intra state rates as authorized by the Ohio Public Utilities Commission effective August 1, 1932 (*ibid.*). The Interstate Commerce Commission, upon complaint filed by the railroads[1] challenging the lawfulness of the reduced intrastate rates, found that the reductions resulted in undue preference of Ohio shippers and localities and undue prejudice to interstate shippers and localities, and in unjust discrimination against interstate commerce, in violation of section 13 (4) of the Interstate Commerce Act (49 U. S. C. 13 (4)). *Intrastate Rates on Bituminous Coal Within Ohio,* 192 I. C. C. 413 (May 2, 1933). The I. C. C. ordered the carriers to remove such preference, prejudice, and discrimination by establishing and maintaining intra state rates at a level not lower than the rates in effect

[1] All of the principal railroads operating in Ohio joined in the complaint except the Wheeling & Lake Erie, which is now a part of the Nickel Plate.

prior to August 1, 1932 (192 I. C. C. at 452). The I. C. C.'s order was sustained by a three-judge district court upon the ground that the reduced rates were preferential of intrastate shippers and localities, and prejudicial to interstate shippers and localities. In view of the finding, the district court did not pass upon the issue of discrimination against interstate commerce. *State of Ohio* v. *United States,* 6 F. Supp. 386 (S. D. Ohio). The district court's decision was affirmed by this Court in *Ohio* v. *United States,* 292 U. S. 498. On February 16, 1934, the prior rates were reestablished (298 I. C. C. at 86).

Thereafter, several general increases in the prior rates, both interstate and intrastate, were authorized by the I. C. C.[2] Although the increases were substantial, the differentials remained very nearly the same between the various mines to the Cleveland area (298 I. C. C. at 86). The increases thus authorized by the I. C. C. were approved for intrastate application by the Ohio Public Utilities Commission, including the approval on May 7, 1953, of the Ex Parte 175 increase of twelve percent, maximum 40 cents per ton, and the increases in the intrastate rates became the same as the increases in the interstate rates. The action of the Ohio Commission in approving intrastate the Ex Parte 175 increase was upheld by the Supreme Court of Ohio on March 17, 1954. *Toledo Edison Co.*

[2] See Ex Parte No. 162, *Increased Railway Rates, Fares and Charges, 1946*, 266 I. C. C. 537; Ex Parte No. 166, *Increased Freight Rates, 1947*, 270 I. C. C. 403; Ex Parte No. 168, *Increased Freight Rates, 1948*, 276 I. C. C. 9; Ex Parte No. 175, *Increased Freight Rates, 1951*, 280 I. C. C. 179, 281 I. C. C. 557, 284 I. C. C. 589.

v. *Public Utilities Commission of Ohio,* 161 Ohio St. 221.

Early in 1954, appellant Cleveland Electric Illuminating Company, a large consumer of bituminous coal used in connection with the production of electricity in the territory adjacent to Cleveland, Ohio, began negotiations with the railroads for a reduction in the intrastate rates on coal. The principal argument advanced by the Illuminating Company in support of a rate reduction was that this was necessary to prevent a substantial diversion of the coal traffic to motor carriers. 298 I. C. C. at 88.

Prior to 1950, the Illuminating Company had received all of its coal requirements by rail. In that year, however, it began using trucks to transport small amounts of coal. By the year 1954, the Illuminating Company was trucking a rather substantial amount of coal from some of the mining districts nearest to the Cleveland area. As a result of the negotiations between the Illuminating Company and the railroads, the latter on April 23, 1954, proposed a reduction of 31 cents in the rail coal rates from Raymilton, Pa., to Ceico, Ohio (a distance of about 82 miles). A short time later, a similar reduction was proposed in the rail rates from Raymilton to the Illuminating Company's plant at Willoughby (Eastlake). Accordingly, the rates to both of these destinations became $2.36 per ton instead of $2.67. 298 I. C. C. at 87–88.

Thereafter, in April and May 1954, the principal railroads decided to reduce the rates on fine coal by 44 cents per ton from the Ohio No. 8, Middle, Lee-

tonia, Cambridge, and Crooksville districts in Ohio, the Moundsville and Fairmont districts in West Virginia, and the Pittsburgh, Connellsville, and Freeport districts in Pennsylvania, to Cleveland, Lorain, Avon Lake, and Willoughby (Eastlake), including intermediate points. 298 I. C. C. at 88; Tr. 3614–3615.

Immediately after the publication of these reduced rates, the railroads received numerous requests for reductions from other origins and to other destinations (298 I. C. C. at 88; Tr. 3617). Thereupon, the railroads concluded that the matter should be given further consideration before the reduced rates became effective, and asked both the federal and the state commissions to postpone the effective date from August 2 to September 2, 1954. Authority to postpone was granted by the I. C. C. as to the interstate rates. The Ohio Commission at first granted the postponement of the intrastate rates, but later rescinded its action. Thus the 44-cent reduction on the Ohio intrastate coal rates here involved became effective on August 2, 1954, and have since been maintained. The proposed reductions in the interstate coal rates were further postponed from time to time, over the protests of various interstate shippers (Tr. 3620–3621), and, subsequent to the I. C. C.'s decision here involved, were canceled. As soon as the Ohio intrastate rate reductions went into effect, the Nickel Plate refused to increase its rates voluntarily. The other carriers were accordingly compelled for competitive reasons to adopt the same rates on intrastate shipments of coal (298 I. C. C. at 88–89).

*Proceeding before the Interstate Commerce Commission.* On September 7, 1954, all the railroads involved, except the Nickel Plate, filed a petition with the I. C. C. alleging that the reduced intrastate rates resulted in a violation of the I. C. C.'s order of May 2, 1933, in *Intrastate Rates on Bituminous Coal Within Ohio, supra,* and sought enforcement of that order or such other relief as might be warranted. In response, the I. C. C. reopened the 1933 case to determine whether the intrastate rates contravened (a) the requirements of the 1933 order, and (b) the provisions of section 13 (3) and (4) of the Act (298 I. C. C. at 89).[3] After extensive hearings, the I. C. C. on March 5, 1956, issued its decision and order, finding: (a) that the reduced intrastate rates do not contravene the requirements of the 1933 order; and (b) that these rates are, and for the future will be, unduly preferential of Ohio shippers and localities and unduly prejudicial to interstate shippers and localities from origin districts in Pennsylvania and West Virginia, and that such rates are causing unjust discrimination against interstate commerce. The order implementing the findings required that the intrastate rates in effect on August 1, 1954, be re-established.

Following denial of petitions for reconsideration,

[3] Section 13 provides in applicable part as follows:

(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to

the appellants brought the present suit to set aside the I. C. C.'s order. In dismissing appellants' complaint, the court below upheld the I. C. C.'s determination that the reduced intrastate rates in issue have caused undue preference and prejudice between persons and localities in intrastate and interstate commerce. Accordingly, as in the prior litigation involving the same rate structure (*State of Ohio* v. *United States*, 6 F. Supp. 386, affirmed, 292 U. S. 498), the court found it unnecessary to consider the I. C. C.'s additional determination that the reduced intrastate rates in issue constitute a revenue discrimination against interstate commerce.

## ARGUMENT

1. Appellants' principal contention is that the I. C. C., in directing the re-establishment of the Ohio

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hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. * * *

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

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intrastate rates which had been in effect on August 1, 1954, failed to give adequate consideration to the impact of truck competition. Specifically they contend that the Commission erred in not concluding that truck competition was "a differentiating factor" (Juris. St. 12) which justified the reduced intrastate rates. According to appellants, the intrastate rail carriers should not be left "defenseless against truck competition" (Juris. St. 18).

It is at least doubtful whether the appellants—consumers and consignees of coal—have standing to make this contention. However commendable may be their solicitude for the welfare of the railroads, appellants occupy the anomalous position of customers who complain of the effects *on the railroads* (who instituted the proceeding) of the possible diversion of the customers' business to motor carriers because of claimed substantial economies. Compare *Sprunt* v. *United States,* 281 U. S. 249; *United States* v. *Merchants Etc. Ass'n,* 242 U. S. 178. In any event, even assuming *arguendo* that appellants have the requisite standing, it is certainly significant that none of the railroads which would be affected by the truck competition has undertaken to attack the I. C. C.'s order. The reason for the railroads' failure to attack the order is apparent from a consideration of the I. C. C.'s findings.

The Commission concluded that, "On this record, we are not convinced that an increase in the intrastate rates to their former level would cause a diversion of traffic to the trucks to such an extent that the [railroads] would suffer a greater loss in revenue

than would result from maintenance of the present rates." In support of this conclusion, the Commission found: "There is no truck competition from the interstate districts or the Ohio No. 8, Cambridge, and Crooksville districts to the Cleveland area. There is some truck competition from the Middle and Leetonia districts, but it is indicated that it is not of sufficient severity to warrant different treatment of the rates from those districts and the rates from the other districts." 298 I. C. C. at 109.

These findings are pertinent to determining whether it would be feasible for the Illuminating Company to divert, from rail to truck, coal purchases of 1,000,000 tons annually, as it had threatened to do. The Commission rejected various estimates offered by the Illuminating Company as to the cost of transporting coal by truck, because some involved a juggling of the cost of coal with the cost of transportation, while others contained no allowance for profit. The Commission found that the most significant of the cost studies produced a rate of $3.12 per ton from mines in Ohio No. 8 district, as compared with the prior rail rate of $3.07 which the Commission ordered restored (298 I. C. C. at 97–98). Indeed, neither here nor in the court below was it seriously contended that it is feasible to transport coal by truck from Ohio No. 8 district to the Cleveland area.

The factor of truck competition was thus limited to a consideration of the extent to which the Illuminating Company could obtain its coal requirements from the Middle and Leetonia districts, which are nearer to Cleveland than is Ohio No. 8 district.

Plaintiff's Exhibit 510 shows that in 1953, out of 3,304,000 tons of steam coal shipped to Cleveland, 1,734,000 tons, or more than half, came from Ohio No. 8 district, 463,000 tons from the Fairmont district in West Virginia, 350,000 tons from the Middle and Leetonia districts in Ohio, and 129,000 tons from the Moundsville district in West Virginia. Since it is undisputed that there is no truck competition from the interstate districts or from Ohio No. 8 district, and since the most recent available figures showed that the Middle and Leetonia districts furnished little more than ten per cent of the steam coal shipped to Cleveland, the Commission's conclusion as to motor carrier competition clearly was supported by substantial evidence.[4]

The Commission was therefore free to conclude that the reduced intrastate rates, by destroying the long-standing system of differential rates, would exclude western Pennsylvania and northern West Virginia coal producers from the northeastern Ohio market, and that such rate reduction would probably spread, with consequent additional revenue loss to the carriers. Under these circumstances, we submit that the Commission was warranted in requiring re-establishment of the system of differential rates previously sustained by this Court, under which consumers in northeastern Ohio have access to many sources of supply in Ohio, Pennsylvania, and West

[4] Appellants' contention (Juris. St. 18) that the Commission disregarded *potential* truck competition is, as the court below pointed out (Juris. St. Appendix A p. 13), merely based on a play on words.

Virginia, and under which producers in these areas are able to compete for the northeastern Ohio market.

2. Appellants also contend that the Commission erroneously held that it had no power to require a reduction in the interstate rates in order to correct undue preference and prejudice between intrastate and interstate persons and localities (Juris. St. 19). But the Commission made no such holding. Instead, its actual holding simply was that the instant case did not present the issue. The Commission stated (298 I. C. C. at 106–107):

> We agree that the relationship between State and interstate rates is a primary consideration here, but we do not agree that, *under the issues in this reopened proceeding,* we may order a reduction in the interstate rates. Whether or not in a section 13 (3) proceeding where the issue as to the interstate rates is squarely raised and tried, maximum interstate rates may be prescribed by us under the powers conferred upon this Commission in that section of the act, *need not here be determined.* At the further hearing herein, the examiner plainly stated, in response to inquiries from counsel, that in his opinion the interstate rates as such were not in issue. The record shows that prior to August 2, 1954, the differentials between the various producing districts, interstate and intrastate, had been in effect generally, with only slight changes or modifications, for more than 30 years, and that some of the interstate shippers are suffering a severe disadvantage in attempting to compete in the Cleveland area under the present adjustment, but they made no attempt to show that the

> interstate rates exceed a maximum reasonable level. (Emphasis added.)

Thus, since the reasonableness of the interstate rates was not presented under the pleadings and proof in the case, the Commission properly refrained from determining that question, and there was no occasion to determine the Commission's powers over interstate rates in a Section 13 (3) proceeding.[5]

3. Appellants' remaining contention (Juris. St. 23) is that by its order the Commission has preserved a differential system of intrastate and interstate rates on coal moving to northeastern Ohio which is in conflict with this Court's decision in *United States* v. *Illinois Central,* 263 U. S. 515, 524, holding that a "* * * difference in rates cannot be held illegal [because unduly preferential and prejudicial] unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions." This contention finds its answer in *Ohio* v. *United States,* 292 U. S. 498, sustaining the same rate structure as the instant case. See also *Ayrshire Collieries* v. *United States,* 335 U. S. 573, 590–593.

In the district court, appellants relied upon evidence that in 1953 Ohio intrastate shipments of coal to the Illuminating Company moved an average distance of 131.8 miles and with an average revenue (at the reduced rates) of $2.61 per ton, as compared with

[5] Furthermore, the Ohio Public Utilities Commission, and the Ohio Supreme Court in 1954, had ruled that the intrastate rates, as they existed before the rate reduction which occasioned the present suit, were just and reasonable (*supra*, p. 3).

an average haul of 125.6 miles and an average revenue of $2.52 per ton on all interstate movements of coal to and from Ohio. As the court below pointed out (Juris. St., Appendix A, p. 11):

> This is not an apt comparison. There is no relevant relation between rates on intrastate shipments to the Illuminating Company and rates on a heterogeneous combination of shipments into and out of Ohio from various points of origin to diverse destinations. We are concerned here with the relation between intrastate and interstate rates to a common destination area. It is obvious that if the average distance of intrastate movements of coal to the Illuminating Company was 131.8 miles, the average distance of the interstate shipments to that company's plants from the more remote interstate districts would be greater and that the average revenue on such longer hauls at higher interstate rates would be in excess of the average revenue on the shorter haul of 131.8 miles.

Appellants further argue that, on traffic of the Illuminating Company moving to the involved destinations from intrastate and interstate origins, the ratio of revenue received by the rail carriers to their out-of-pocket cost was greater for the intrastate traffic than for the interstate traffic (Juris. St. 25). "But even if this were true," the court below correctly held (Juris. St., Appendix A, p. 12), "it would not demonstrate that the intrastate rates were relatively higher. It is an axiom of rate-making that the longer haul yields a lower per ton mile return. *Ohio* v. *United States*, 292 U. S. [498]." Moreover, this

aspect of the case is governed by this Court's holding in *Ayrshire Collieries* v. *United States, supra,* at 590–593, that, since the Commission may consider competition in addition to the factors of distance and transportation conditions, a rate structure such as that involved in this case is not invalidated by the fact that in some instances the rate (not merely, as here, the revenue produced by a rate) is greater for some shorter hauls than for longer hauls.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below is correct and that this appeal presents no substantial questions. The judgment of the district court should be affirmed.

J. LEE RANKIN,
*Solicitor General.*

ROBERT W. GINNANE,
*General Counsel,*
SAMUEL R. HOWELL,
*Associate General Counsel,*
*Interstate Commerce Commission.*

MAY 1957.

FILED
MAY 22 1957
JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

## No. 927

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, THE NORTH AMERICAN COAL CORPORATION, AND OHIO COAL ASSOCIATION, *Appellants*,

VS.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*, AND THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Intervenors-Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

## MOTION OF THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., INTERVENORS-APPELLEES, TO AFFIRM

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Date: May 22, 1957.

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IN THE

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## MOTION OF THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., INTERVENORS-APPELLEES, TO AFFIRM

Intervenors-Appellees,[1] pursuant to Rule 16, paragraph 1(c) of the Revised Rules of the Supreme Court, move that

[1] The Intervenors-Appellees include The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Erie Railroad Company, The Monongahela Railway Company, Montour Railroad Company, New York Central Railroad Company, Norfolk and Western Railway Company, The Pennsylvania Railroad Company, The Pittsburgh and Lake Erie Railroad Company, The Pittsburgh & West Virginia Railway Company, The Virginian Railway Company, Western Allegheny Railroad Company, and Western Maryland Railway Company.

the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

## STATEMENT OF THE CASE

This is a direct appeal from a judgment of a statutory three-judge District Court entered on December 27, 1956, pursuant to U. S. Code, Title 49, sec. 17(9) and Title 28, secs. 2321-2325, which dismissed a complaint seeking to set aside an order of the Interstate Commerce Commission, entered pursuant to section 13(3)(4) of the Interstate Commerce Act (U. S. Code, Title 49, sec. 13(3)(4)) in a proceeding entitled *Intrastate Rates on Bituminous Coal Within Ohio,* 298 I.C.C. 85.

The facts as shown by the report of the Interstate Commerce Commission and as found by the District Court may be briefly summarized as follows:

For many years prior to 1932, the rates on bituminous coal from mining districts in Ohio to destinations in the northeastern part of that state were related by fixed differentials to the rates to the same destinations from mining districts in Pennsylvania and West Virginia. In that year, the Ohio Public Utilities Commission reduced various intrastate rates to northeastern Ohio. On petition of the principal railroads, the Interstate Commerce Commission found that the reduced rates resulted in undue preference of Ohio shippers and localities and undue prejudice to shippers and localities in interstate commerce and in unjust discrimination against interstate commerce in violation of section 13(4) of the Act. The Commission, therefore, ordered the restoration of the intrastate rates to their earlier level.

*Intrastate Rates on Bituminous Coal Within Ohio*, 192 I.C.C. 413. That action of the Commission was ultimately sustained by this Court in *Ohio v. United States*, 292 U. S. 498. Thereafter, through the various general increases in interstate rates which were authorized by the Interstate Commerce Commission in Ex Parte Nos. 115, 162, 166, 168 and 175, the Ohio Public Utilities Commission authorized the same general increases so that the differentials which had been in existence before 1932, and which had been restored in the earlier proceeding, remained unaltered to any substantial extent until August 1, 1954.

The change in this situation in 1954 came about in the following manner. After having failed in protracted litigation concerning the reasonableness of the intrastate rates, both before the Ohio Public Utilities Commission and the Supreme Court of Ohio (Jur. St., App. B, p. 87), appellant, The Cleveland Electric Illuminating Company, a large consumer of bituminous coal, began negotiations with the railroads for a reduction in those rates on the basis of truck competition. The Illuminating Company had begun to experiment with truck transportation of coal in 1950 and by 1953, it was trucking a substantial volume between points not involved in this proceeding, and it threatened to move much more by truck. It gave the railroads certain figures purporting to show the cost of transportation by truck (which data, as will be later indicated, was completely discredited in the proceedings before the Interstate Commerce Commission). In May 1954, therefore, the railroads decided to meet the threatened truck competition by a reduction of 44 cents per ton in the rates to northeastern Ohio from certain Ohio points and, to maintain rate relationships, from certain points in Pennsylvania and West Virginia. The intrastate rates which the railroads decided to reduce had been found reasonable in 1953 both by the Ohio Public

Utilities Commission and the Supreme Court of Ohio. Tariffs embodying the reduced rates were filed with the Interstate Commerce Commission and with the Ohio Public Utilities Commission to become effective on August 2, 1954. (Jur. St., App. A, pp. 7-8.)

The publication of the proposed 44-cent reduction in rates resulted in a large number of requests to the railroads for reductions in rates by shippers and consumers in other origin districts and at other destinations. As a result, the railroads concluded that further study should be made before the reduced rates became effective and applied to the respective commissions for permission to postpone the effective date of the reductions in both the interstate and intrastate rates. The Interstate Commerce Commission granted the request. The Ohio Public Utilities Commission, however, refused the request for postponement of the intrastate rate reduction and it became effective on August 2, 1954.

Shortly after August 2, 1954, all the railroads, except the Nickel Plate, filed a petition with the Interstate Commerce Commission claiming that the reduced intrastate rates violated the order of the Commission entered in the 1932 proceedings, and sought either enforcement of that order or such other relief as might be warranted. The Commission thereupon reopened the 1932 proceeding to determine whether its earlier order was being violated and whether the intrastate rate reduction contravened the provisions of section 13(3)(4) of the Act. After extensive hearings, the Commission found that its earlier order was not violated, but that the reduced Ohio intrastate rates were unduly preferential of Ohio shippers and localities and unduly prejudicial to localities and shippers in origin districts in Pennsylvania and West Virginia, and that the rates caused

unjust discrimination against interstate commerce. Its order required that the rates in effect on August 1, 1954, be reestablished. 298 I.C.C. 109-10. Petitions for reargument and further consideration were denied on June 26, 1956.

Although the Nickel Plate Railroad joined with the present appellants in defending the 44-cent reduction before the Interstate Commerce Commission and in resisting the increase in rates sought by the other railroads and ultimately granted by the Commission's order, that order has now been fully complied with, the increased rates required thereby are in effect and the Nickel Plate Railroad did not join in the suit to set aside the Commission's order.

The District Court, in dismissing the petition for review filed by appellants herein, did not find it necessary to pass upon both aspects of the Commission's order. Insofar as the Commission found that the intrastate rates in issue "... are, and for the future will be, unduly preferential of Ohio shippers and localities and unduly prejudicial to interstate localities and shippers ...", the District Court held that the Commission's findings were adequate to support its order, and that the findings were, in turn, supported by substantial evidence. But, as in the 1932 proceeding (see *Ohio v. United States*, 292 U. S. 498), the Court found it unnecessary to pass on the issues raised as to unjust discrimination against interstate commerce. *Cleveland Electric Illuminating Co., et al. v. United States, et al.*, 147 F. Supp. 622.

## ARGUMENT

The decision of the District Court does not present any question of substance warranting further argument in this Court. Appellants seek to have this Court review and redetermine a number of issues of fact by a detailed re-

view of a voluminous record. This has already been done by the District Court in an opinion prepared with obvious care and with full attention to the same factual issues now presented here again, and with full appreciation of the standards of review laid down by this Court. Affirmance of the decision below will be fully consistent with the prior decisions of this Court.

## I.

### Appellants Seek A Re-review of the Evidence

The Statement As To Jurisdiction filed by appellants shows that they either ignore or misunderstand the respective functions of the District Court and this Court in the review of orders such as that of the Commission in this case. In *Universal Camera Corp. v. Labor Bd.*, 340 U. S. 474, this Court made it clear that when a lower court charged with review of an administrative order has applied the proper standards of review, this Court does not re-examine the record to determine whether the lower court was correct. At pages 490-1 of its opinion in that case, this Court stated:

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

Appellants, significantly, do not assert that the District Court in this case misapprehended its proper role, and examination of the questions raised by appellants will demonstrate that such questions are not substantial and that the District Court plainly understood and properly exercised its powers of review.

APPELLANTS' QUESTION NO. I

*"I. Whether that finding of the Commission with respect to truck competition is supported by essential findings based on substantial evidence."*

The question whether the Commission's findings on the issue of truck competition are adequately supported by subsidiary findings and based on substantial evidence was thoroughly considered by the District Court. After such consideration, that Court correctly concluded:

> "It would serve no purpose to review at length the evidence on this issue, which is set out with great particularity in the Commission's report. All pertinent facts, both favorable and unfavorable to the position of plaintiffs, were considered by the Commission.
>
> "The actual trucking of coal to the Illuminating Company plants from Raymilton, Pennsylvania and from the Middle and Leetonia districts in Ohio was done by producers who supplied the coal. It was the Commission's view that the trucking rates charged by the producers were not reliable indicators of fair rates for that mode of transportation. In the two instances where the trucking rates from Raymilton were reduced ten cents a ton by the producers, these reductions were offset by contemporaneous increases in like amounts in the price of the coal, with the result that the total delivered price to the Illuminating Company remained unchanged. The average rate of trucking from the Middle and Leetonia districts was said to be $2.80 per ton, which is the same as the prior rail rate from the same districts. It was shown that if the Illuminating Company embarked upon a program of trucking upwards of a million tons of coal from the Middle and Leetonia districts and from Raymilton, this would require the company either to purchase the necessary equipment and do the hauling itself, or to engage a competent trucking company for that purpose. In this connection the Illuminating Company submitted four studies of the cost of such large scale trucking. Two of

these studies were prepared by companies that had no experience in trucking and they contain no items for profit. The third study, which was merely a comparison of the cost of trucking coal with an estimate of the cost of hauling iron and steel, was likewise deficient in its omission of any consideration of profit. The fourth study contemplated the use of a light-weight tractor and an aluminum trailer which, the Commission observed, had never been tested and 'so far as appears it is merely in the blueprint stage.' Evidence of many other factors bearing upon this issue were also referred to in the Commission's report. These included a survey of the Nickel Plate Railroad showing the amount of trucking to the Cleveland area in the first eleven months of 1954; the increased use of trucks for the delivery of coal to the cities of Akron, Canton and Massillon from the nearby mines in the Middle and Leetonia districts; the large general increase in the use of trucks for transporting coal in Ohio, and the absence of such an increase in trucking to the Cleveland area. There was evidence also of a substantial increase in the tonnage of coal transported by rail to the Cleveland area in recent years" (147 F. Supp. 622, 629-30).

In an effort to create the impression that the Commission's conclusion on the issue of truck competition is contrary to the evidence, the appellants, at pages 14-17 of their Statement As To Jurisdiction, summarize some of the evidence more favorable to their contentions. This partial summarization of evidence, on the basis of which the appellants contend that the only possible conclusion is that reached by the Examiner, is nothing more than an attempt to have this Court substitute its judgment for that of the Commission.[2] When confronted with a similar effort by the

[2] In view of the partial summarization of the truck competition evidence included in appellants' Statement As To Jurisdiction, there is attached to this Motion, as Appendix A, a more complete summary of the evidence on this issue contained in the record before the Interstate Commerce Commission.

appellants, the District Court again properly concluded that:

> "It may be that on the basis of the evidence, reasonable minds might disagree as to the extent of the probable future truck competition from the Middle and Leetonia districts. However, it is the function of the Commission to weigh the evidence and draw the inferences therefrom. This court cannot substitute its judgment or the judgment of the examiner for that of the Commission. In determining the issue of truck competition, as well as all other factors involved in rate-making, the Commission is peculiarly qualified by training and experience to form sound judgments. Under our limited jurisdiction it is not for us to say whether we would have reached the same conclusion on the same evidence or whether we disagree with the reasoning of the Commission or the wisdom of its determination. It is enough that the Commission's finding on the issue of actual and potential truck competition, which necessarily rests upon a compound of fact and prophecy, is supported by substantial evidence and a fair and informed forecast of future probabilities" (147 F. Supp. 622, 630).

This conclusion of the District Court is in full accord with the opinion of this Court in the suit to set aside the Commission's order of May 2, 1933 in this case. In that opinion, Justice Roberts stated:

> ". . . In effect, we are asked to reexamine the evidence, appraise it, and hold the Commission erred in its judgment as to the facts. We have often said that we have no such power." *Ohio v. United States,* 292 U.S. 498, 506 (1934).

APPELLANTS' QUESTION NO. II

*"II. Whether the Commission, in making that finding with respect to truck competition, could rationally give consideration only to existing and past truck competition and could disregard or treat as legally irrelevant evidence as to imminent large scale diversions to truck service if the intrastate rates were not reduced."*

Appellants attempt, in raising this question, to construe one word in the Commission's findings as proof that it disregarded "imminent large scale diversions to truck service." The Commission, after finding no truck competition from three of the five Ohio origin districts (a finding not seriously challenged), found (298 I.C.C. 109):

> ". . . There is some truck competition from the Middle and Leetonia districts, but it is indicated that it is not of sufficient severity to warrant different treatment of the rates from those districts and the rates from the other districts."

Appellants argue, solely on the basis of the use by the Commission of the word "is" in this sentence, that the Commission limited its consideration to "existing and past truck competition" (Jur. St., p. 18). The word "is" — the present tense — in speaking of a concept such as competition, certainly does not require such a narrow meaning,[3] and is equally susceptible of the interpretation given it by the District Court (Jur. St., App. A, p. 13) — that the Commission "meant potential as well as actual truck competition". But were there doubt as to the Commission's meaning, it is completely dispelled by a reading of the Commission's report as a whole. It gave full consideration to appellants' claim

[3] Indeed, as appellants purport to read the sentence, the word "is" would refer only to the present competition, excluding even past competition, yet they themselves read the word as including both "present" and "past" competition (Jur. St. p. 3).

that restoration of the prior intrastate rates would make it feasible, from a cost standpoint, to truck a million tons of coal a year from the two origin districts in question. See 298 I.C.C. 96, 102. And in its ultimate finding on this issue the Commission stated (298 I.C.C. 109):

> "On this record, we are not convinced that an increase in the intrastate rates to their former level would cause a diversion of traffic to the trucks to such an extent that the respondents would suffer a greater loss in revenue than would result from maintenance of the present rates."

Certainly no one can seriously contend that the phrase "would cause a diversion of traffic to the trucks" refers only to existing and past truck competition, and not to potential truck competition.

In sum, appellants' first two questions present no more than the basic issues of fact finding and judgment which were originally presented to and resolved by the Commission, and which, as thus resolved, have been carefully reviewed and approved by the District Court. They do not warrant further briefs and argument in this Court. *Mississippi Public Service Commission v. United States*, 349 U. S. 908.

## II.

### The Alleged Errors of Law Are Without Substance

In addition to appellants' request that the Court reevaluate the record in this case to determine whether the District Court has "grossly misapplied" the standard under which it reviews orders of the Commission, appellants' Statement As To Jurisdiction, by questions III and IV, requests correction by this Court of two alleged errors of law by the District Court. The questions are without substance.

APPELLANTS' QUESTION NO. III

"*III. Whether, if the previously existing differences between the intrastate and interstate rates must be restored under a finding of preference and prejudice, the Commission has power to order a reduction in the interstate rates, or whether, under section 13(4) of the Interstate Commerce Act, the Commission's power is limited to ordering an increase in the intrastate rates.*"

In raising this question on appeal, the appellants seek a determination by this Court of an issue which has never required decision in the entire course of these proceedings. The question is, therefore, entirely collateral to the present case.

In its order reopening these proceedings, the Interstate Commerce Commission specifically limited the investigation to a determination whether the *intrastate rates* violated section 13(3)(4) of the Interstate Commerce Act. Thereafter, the evidence of all the parties was directed to the lawfulness of the *intrastate rates*, with the exception of certain evidence presented by the railroads to show that the then existing level of interstate rates was a reasonable one. After the closing of the record, the filing of briefs, exceptions and oral argument, the Commission concluded in its Finding 4 (298 I.C.C. 109) that undue preference of Ohio shippers and localities and undue prejudice to interstate shippers and localities resulted from the reduced level of the *intrastate rates*. In addition, the Commission found in Finding 2 (298 I.C.C. 109) that the interstate rates were reasonable and noted in its report the fact that in the course of the proceedings no party contended otherwise. From these facts, it is obvious that no issue of preference and prejudice resulting from the level of the interstate

rates ever arose in the proceedings. Moreover, contrary to the suggestion in appellants' Question No. III, the Commission did not hold, as a matter of law, that it was lacking in power under section 13(4) to order a reduction in interstate rates. The specific ruling of the Commission reads as follows:

> "We agree that the relationship between State and interstate rates is a primary consideration here, but we do not agree that, *under the issues in this reopened proceeding*, we may order a reduction in the interstate rates. Whether or not in a section 13(3) proceeding, where the issue as to the interstate rates is squarely raised and tried, maximum interstate rates may be prescribed by us under the powers conferred upon this Commission in that section of the act, *need not here be determined*. . . ." (Emphasis supplied.) (298 I.C.C. 106-7).

The Commission, in other words, recognized that in a proceeding where the lawfulness of only the intrastate rates had been brought in issue and where no one had contested the level of the interstate rates, the question of its power to reduce interstate rates under section 13(4) was immaterial.

The District Court agreed (Jur. St., App. A, p. 16) and pointed out the additional fact that, ". . . It is clear from a reading of the report that the Commission's refusal to reduce such [interstate] rates was also based upon grounds entirely unrelated to its presumed lack of power to do so . . ." There is simply no basis for appellants' claim that the legal question which the Commission did not decide, and which the District Court did not decide, should or could be decided by this Court.

APPELLANTS' QUESTION No. IV

*"IV. Whether the Commission's findings disclose that the Commission has complied with the rule of this Court in United States v. Illinois Central, 263 U. S. 515, 524, that a difference in rates cannot be held to be illegal, because unduly preferential and prejudicial, unless it is shown that such difference 'is not justified by the cost of the respective services, by their values, or by other transportation conditions'."*

In *United States v. Illinois Cent. R.R.*, 263 U. S. 515, the Court said at page 524:

> ". . . difference in rates cannot be held illegal [because unduly preferential and prejudicial], unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."

This rule, appellants assert, has been violated because the Commission, in appellants' opinion, ". . . abandons transportation standards and takes refuge in assumed competitive needs and historical relationships . . ." (Jur. St., p. 25).

Quite plainly, the Commission has done nothing of the sort. The statement in the report of the Commission to which appellants refer is as follows (298 I.C.C. 101):

> ". . . It is of course recognized that cost is only one of a number of important elements to be considered in determining the lawfulness of rates, and that rates on coal are not generally made on a mileage basis but are related to one another by group differentials which usually reflect competitive needs more than distances."

The statement is in full accord with the well-established principle of rate-making that in a group and differential rate relationship, rates from remote differential groups are, in their very nature, lower in level than the rates from nearer

districts. *Board of Railroad Commrs., S. Dak. v. Chicago, B. & Q. R. Co.*, 173 I.C.C. 773, 778; *West Kentucky Coal Bureau v. Illinois Central R. Co.*, 194 I.C.C. 91, 99; *Ayrshire Corp. v. United States*, 335 U. S. 573.

Even if it stood alone, this statement by the Commission could not possibly be construed as meaning that the Commission relied *only* on the competitive needs of shippers and historical rate relationships in fixing the intrastate rates. But it does not stand alone. The report of the Commission discloses many other transportation standards and conditions considered by the Commission in fixing the level of the intrastate rail rates. Among these are (1) the revenue needs of the respondent railroads, (2) the volume of present and prospective trucking to the Cleveland area and trucking cost evidence, (3) the volume of rail shipments to the Cleveland area, (4) the history of the rail rate adjustments both to the Cleveland area and other contiguous areas, (5) rail cost evidence submitted by the appellants even though it was found not to ". . . have the accuracy necessary for a fair approximation of the actual costs incurred from the various origin districts, as many assumptions had to be made . . ." (298 I.C.C. 101), (6) comparisons of both interstate and intrastate rates in the Cleveland and other adjustments, (7) comparative earnings under both intrastate and interstate rates, and (8) comparative railroad operating conditions in the intrastate and interstate rail service. An additional and most important fact considered by the Commission was the finding of the Ohio Public Utilities Commission that the higher level of intrastate rates was reasonable. *In the Matter of Increases in Freight Rates and Charges Within the State of Ohio, Formal Case No. 23104, Ohio Public Utilities Commission*, decided May 7, 1953, and affirmed by the

Supreme Court of Ohio in *Toledo Edison Co. v. Public Utilities Commission*, 161 Ohio St. 221, 118 N. E. (2d) 531.

It is thus clear that the Commission did not, as appellants contend, rely *solely* on "assumed competitive needs and historical relationships." It did, of course, place great emphasis on the incontestable fact that interstate shippers suffered great losses in business after the intrastate-interstate differentials were drastically increased on August 2, 1954. Moreover, the Commission properly considered the history of the rate adjustment as evidence of its reasonableness. As this Court said in *Youngstown Co. v. United States*, 295 U. S. 476, 480, "The existing rate structure furnished support for the finding of reasonableness." But by no means can it be said that these were the only transportation standards considered by the Commission.

Moreover, *United States v. Illinois Cent. R.R.*, *supra*, involved not section 13(4) of the Interstate Commerce Act but, rather, section 3(1) which deals with relationships between different interstate rates rather than relationships between interstate and intrastate rates. *Ohio v. United States*, 292 U. S. 498, is the leading decision of this Court on the question of the findings which the Commission must make to support an increase in intrastate rates to remove undue preference and prejudice as between persons and localities. At page 511 of that decision, this Court stated.

> "The Commission has found that the interstate rates from four districts of origin are reasonable. It has found that Ohio intrastate rates, the transportation conditions being similar, are, distance considered, out of relation to these interstate rates, so as to create undue preference and prejudice. These findings, supported by evidence, fully justified the order with re-

spect to the intrastate rates under section 13 of the Act. Compare *Louisiana Commission v. Texas & N. O. R. Co.*, 284 U.S. 125."

Here, the Commission has found (1) that the involved interstate rates are reasonable (Finding 3), (2) that the transportation conditions under which the involved interstate and intrastate transportation is performed are similar (Finding 2), (3) that the relationships between the interstate rates and the intrastate rates, as they existed before the 44-cent reduction in the intrastate rates, had been in effect for many years, that those state rates were approved by the Ohio Commission and, if restored, would not be unreasonable in relation to interstate rates (Finding 7), (4) that the reduced intrastate rates cause undue preference and prejudice as between persons and localities in intrastate and interstate commerce (Finding 4) and (5) that the increased intrastate rates will not exceed reasonable rates or charges (Finding 7) (298 I.C.C. 109-10). And these findings have been found to be based on adequate subsidiary findings and substantial evidence. Under *Ohio v. United States, supra*, nothing more is required.

## CONCLUSION

For the foregoing reasons, we submit that the decision of the District Court is correct and this appeal presents no substantial question. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

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Date: May 22, 1957.

## APPENDIX A

### Summary of Evidence on the Issue of Truck Competition.[4]

1. In 1953, the rail shipments of bituminous coal to the four involved destinations, Cleveland, Lorain, Avon Lake and Willoughby, from Ohio districts totalled 3,453,532 tons and from interstate districts totalled 8,660,679 tons, or a total of rail shipments from all districts of 12,114,211 tons (Exhibit 429). In contrast, testimony of the protestants shows that in the first eleven months of 1954, only 310,445 tons of coal were trucked into the destination area involved in this case from all origins, of which only 230,360 tons were delivered to industries and others who had rail facilities for receiving coal (Tr. 4031). Members of the Ohio Coal Association had lost accounts in Cuyahoga County totalling only 175,000 tons annually (Tr. 4145). Of 4,876,641 tons of coal delivered from all origins to northeastern Ohio and allegedly diverted to trucks, only 268,335 tons were delivered to destinations accorded the intrastate rate reductions (Exhibit 487, Tr. 4950). The coal transported by truck to these thirteen involved destinations represented only 3.2 percent of the coal movement by rail from all origins (Tr. 4950).

2. Rail shipments of Ohio coal to Cleveland, Lorain, Avon Lake and Willoughby, Ohio increased 162 percent between 1932 and 1953, 106 percent between 1939 and 1953, and 51 percent between 1945 and 1953. In

[4] Figures in parentheses preceded by the letters "Tr." or the word "Exhibit" refer to the transcript of testimony and exhibits in the record before the Interstate Commerce Commission.

comparison, interstate rail shipments of coal to the same destinations increased 147 percent, 49 percent and 12 percent in the same respective periods (Exhibits 431, 432, 433).

3. There has been no trucking of coal from the important interstate districts of Fairmont, Moundsville, Pittsburgh, Connellsville and the southern crescent districts. The only evidence of trucking from the Butler-Mercer District and Raymilton, Pa. to destinations involved in these proceedings is the truck transportation by the Illuminating Company in 1953 from those points to Willoughby, Ohio (Exhibits 510, 517). Because the Pennsylvania truck weight limit is six tons less than the Ohio truck weight limit (Tr. 5113), the cost of trucking from the Pennsylvania origins will be greater than from the Ohio origins. The Raymilton mines could not satisfy even 25 percent of the needs of only one of the Illuminating Company's plants (Tr. 4737).

4. On page 102 (298 I.C.C. 102), the Commission concludes in considering the threat of trucking from the Ohio No. 8 District, by far the most important coal-mining district in Ohio, that:

> "Although the Illuminating Company indicates that it might truck some coal from the northern part of the Ohio No. 8 district if the rates are increased, the record is persuasive that it is not feasible to truck from that district to the Cleveland area . . ."

The substantial evidence in support of this conclusion is that (1) witnesses for the Illuminating Company and the Nickel Plate Railroad admitted they knew of no trucking from mines in the Ohio No. 8

District to the Cleveland area (Tr. 4088, 4702-3) and the only trucking from the Ohio No. 8 District was done on an experimental basis at a loss (Tr. 4222), (2) several witnesses for the protestants testified that the Ohio No. 8 District was beyond practical trucking distance (Tr. 4174, 4182, 4222), and (3) the only actual cost evidence for trucking from the Ohio No. 8 District was 3½ cents per ton-mile in one contract for trucking from the Georgetown Mine. At a distance of 116 miles, this would give a truck cost of $4.06 to Cleveland which compares with a rail rate of $3.07 to Cleveland prior to the 44-cent reduction (Tr. 4178).

5. As to trucking from the Middle and Leetonia Districts, the evidence shows that (1) the coal located there is thin-veined, scattered and in spotty deposits (Tr. 3747), (2) while the Commission has found on page 103 (298 I.C.C. 103) that, from the standpoint of recoverable reserves, the Middle and Leetonia Districts could supply the Illuminating Company with substantial quantities of coal for many years, only 16,292,000 tons of coal are available for strip mining (Exhibit 510, p. 21a, Tr. 4974) and economy in trucking is based on securing strip-mined coal (Tr. 4405-6, 4691, 4481), (3) production by strip-mining in the six counties claimed to be within trucking distance of Cleveland has declined rapidly and the reserves of coal so situated as to be susceptible of strip-mining are being rapidly exhausted (Tr. 4973), (4) the actual trucking costs from the Middle and Leetonia Districts have averaged out at about $2.80 per ton, the same as the rail rate from these districts prior to the 44-cent reduction (Tr. 4421) and the $2.80 truck rate does not reflect all the increases in wages and other

benefits paid the truck drivers in Ohio in recent years (Tr. 4919-20), and (5) from Jensie Mine, an important mine in the Middle District which has always shipped by rail, the distance to the Cleveland outskirts is 100 miles (Tr. 4212) and at 2.9 cents and 3½ cents per ton-mile, two trucking costs submitted by the plaintiffs, the truck rates from the Jensie Mine would be $2.90 and $3.50, respectively, well in excess of the rail rate of $2.80 in effect prior to the intrastate rate reductions.

6. On pages 96 and 97 (298 I.C.C. 96-7), the Commission considers evidence presented by the Illuminating Company to show the costs experienced by that company with truck shipments from Raymilton, Pa. to its Ceico and Eastlake plants. The Illuminating Company's witness testified that in May, 1950, the Illuminating Company started trucking coal from Raymilton, Pa. to Ceico at a "rate" of $2.56 per ton, which the Company was able to reduce to $2.46 per ton about one year later and to $2.36 per ton in October, 1952. The distance was about 82 miles (Tr. 4413-17, 4650, 4654). However, on cross-examination it was developed that each time the "rate" was reduced 10 cents, the mine price of the coal went up 10 cents so that the delivered price of the coal remained the same (Tr. 4649-50), and that no separation was made on the bills between transportation costs and the cost of the coal (Tr. 4666-8). This trucking was performed by the coal company which furnished the coal and a similar arrangement was made with a coal producer for coal trucked to Eastlake from the Butler-Mercer District (Tr. 4655-7). Finally, the Illuminating Company witness testified that large scale trucking by the

Illuminating Company would be an entirely different type of operation (Tr. 4678). After reviewing the evidence as to these private trucking operations in which the cost of the coal and the cost of the transportation were so intermingled as to make them impossible of separation, the Commission reaches the only possible conclusion, namely, that, "In view of this type of operation, the stated truck rates cannot be accepted as a reliable guide as to the cost of transporting coal by truck" (298 I.C.C. 97).

7. There is ample evidence to show that the various trucking cost studies presented by the Illuminating Company were completely unrealistic. None of these studies represented a firm offer by a carrier to transport coal for the Illuminating Company (Tr. 4883). One study was made by a company which manufactures trailers (Tr. 4883), another by a manufacturer of tractors (Tr. 4886), a third by a small mining and trucking company (Tr. 4887), and a fourth was based on I.C.C. cost section calculations for the transportation of iron and steel. The fifth study, which the Commission characterizes as "perhaps the most significant", was based on a completely untested type of highway equipment and is criticized and modified at pages 4908-17 of the transcript of testimony. However, even without these necessary modifications, this study shows a trucking rate of $3.12 for 120 miles. This distance is approximately that from Georgetown in the Ohio No. 8 District to Cleveland and the alleged cost of $3.12 exceeds the rail rate of $3.07 which was in effect prior to the 44-cent reduction (Exhibit 521).

8. The principal alleged saving credited to truck transportation, that of 25 cents per ton covering the cost

of trucking coal to a rail siding, only applies at mines such as that at Raymilton, Pa. which has no rail siding. At mines where coal is dumped from a tipple either into railroad cars or trucks, no such saving would result on the trucked coal (Tr. 4746, 4695-6). At the Warner Collier Company mine in the Middle District, which has an annual production of 500,000 tons, it would cost the same to load by truck as it does by rail (Tr. 4208). Other lesser savings credited to truck transportation do not reflect the cost of installing and maintaining truck-unloading or weighing equipment (Tr. 4887-9).

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956.

## No. 927

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY; THE NORTH AMERICAN COAL CORPORATION; OHIO COAL ASSOCIATION, *Appellants*,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

## BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM.

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## BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM.

Appellants reply to appellees' motion to affirm in order to correct certain misapprehensions and misconceptions on the part of appellees as to the nature of the questions presented by this appeal.

### ARGUMENT

### I.

The important question of statutory construction presented by this appeal—whether the Commission has power to require reductions in interstate rates to cure undue preference and prejudice under section 13(4) of the Interstate Commerce Act (Juris. St., Question No. III, pp. 19-23)—has been misconceived by the appellees.

The Government says that the Commission did not deny its power, but simply held that "the instant case did not present the issue" (Motion, p. 11). That is erroneous. The Commission held that it would not rule on the question of its power to reduce the intrastate rates in the absence of proof that the interstate rates exceed a maximum reasonable level (Juris. St., App. B, at pp. 106-107*). That is the equivalent of denying the power unless the reasonableness of the interstate rates is brought in issue by a complaint filed under section 1 of the Act. This is confirmed by what the Government itself says (Motion p. 12).

> Thus, since the reasonableness of the interstate rates was not presented under the pleadings and proof in the case, the Commission properly refrained from determining that question, and there was no occasion to determine the Commission's powers over interstate rates in a Section 13(3) proceeding.

But the power of the Commission to reduce the interstate rates does not depend upon their being unreasonable for the issue here is no different from what it would be were only two or more interstate rates involved under section 3 of the Act. In such a case it is well established that both rates may lie within the *zone* of reasonableness and yet result in undue prejudice (Juris. St., p. 19). Obviously the same principles are applicable in cases arising under section 13(4) where the only difference is that one of the rates is an intrastate rate. The fact that the higher of the two rates does not exceed a maximum reasonable level does not circumscribe the power of the Commission to re-

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* The Commission's report in Appendix B to the Statement as to Jurisdiction is reproduced photographically and the page numbers correspond to those in volume 298 of the official reports of the Commission.

quire a reduction therein if the Commission concludes that that is the appropriate method for eliminating the undue preference and prejudice.

The railroad appellees mistakenly say that the question is "entirely collateral to the present case" (Motion p. 12). They rest that claim solely on the fact that the Commission's order of investigation was directed to the question of whether the intrastate rates violated section 13(4). But that order, as is true of every order of investigation under section 13(4) directed to particular intrastate rates, no matter how phrased, necessarily raised an issue of lawful rate relations between *two* sets of rates, one intrastate and the other interstate. Every question of undue preference and prejudice, whether under section 3(1) or section 13(4), is always a relationship question involving two or more rates, regardless of the terms in which it is stated. If the relationship between the interstate and intrastate rates was not in issue, then the question of undue preference and prejudice was not in issue. But the Commission decided the latter issue so it is no longer a question of whether the interstate rates were in issue from the standpoint of relationship. Furthermore, the Commission found (Juris. St., App. B, p. 109) that the interstate rates were reasonable so it must follow that those rates were in issue.

Therefore, the only question is as to the *remedy* to be used to remove the preference and prejudice which the Commissioner found to exist. The error of the Commission is in holding that the only means within its power to remove such preference and prejudice was an increase in the intrastate rates.

If the contention of the railroad appellees were sound, then the question of a reduction in interstate rates as an appropriate remedy to cure undue preference and prejudice

under section 13(4) could never be decided. All investigations instituted by the Commission under section 13 of the Act are invariably stated as being into the lawfulness of the intrastate rates. Appellees' position would require that shippers who may be adversely affected as to rates on their intrastate traffic by an investigation under section 13 of the Act would have to file a separate complaint assailing, under section 1 of the Act, the reasonableness of the interstate rates before the Commission would have the power to reduce such rates in establishing a lawful rate relation.

Appellants submit that, under the Act and the *Shreveport* case (Juris. St., p. 21), the Commission has the *power*, once preference and prejudice is shown, to establish lawful rate relations by reducing the interstate rates as well as by increasing the intrastate rates.

It is, therefore, submitted that this is a question of major importance upon which the Court should have the benefit of briefs and oral argument.

## II.

On the incorrect assumption that appellants are merely consignees and consumers of coal complaining about the effect on the railroads of diversion of coal from rail to truck, the Government raises a question concerning appellants' right to question the findings of the Commission.

The Illuminating Company purchases coal f.o.b. the mines. It determines whether the coal is to be shipped by truck or by rail. It determines what specific carriers are to be used and over what routes the coal will move. It pays the freight charges. It is directly affected by the order of the Commission requiring an increase in the rates it must pay.

A similar contention was raised by the railroads in the District Court and was rejected by the Court (Juris. St. App. A., pp. 3-5). The contention here, like that in the Court below "rests upon the false premise that the railroads alone have the right to question the validity of the Commission's order as a whole." (Juris. St., App. A., p. 3).

Furthermore neither of the other appellants is either a consignee or consumer of coal. The North American Coal Corporation is a producer of coal from mines in Ohio and the Ohio Coal Association is an association of such producers. The sale of their coal depends upon their access to important consuming markets, which is determined by the level of freight rates. The interest of these producers is that the higher rail freight rates will force the consumers such as the Illuminating Company to buy more coal from nearby mines in the Middle and Leetonia districts and ship such coal by truck, thus adversely affecting the business of these producers.

## III.

Neither the Government nor the railroad appellees directly challenge appellants' showing (Juris. St., Question No. I, pp. 12-17) that there are no subsidiary findings in the Commission's report to provide rational support for the Commission's finding (Juris. St., pp. 12-17):

> There is some truck competition from the Middle and Leetonia districts, but it is indicated that it is not of sufficient severity to warrant different treatment of the rates from those districts and the rates from the other districts.

Unless the Commission's subsidiary findings of evidentiary facts indicate some rational basis for such a finding, the Commission's order cannot be sustained since that finding is an essential predicate for the Commission's ultimate conclusion of preference and prejudice.

The Government goes outside of the report to claim that the finding is supported by a single item of evidence, *i.e.*, the evidence which shows that in recent years only 350,000 tons, or about 10 per cent, of the steam coal consumed annually in the Cleveland area moved by railroad from the Middle and Leetonia districts and, therefore, the Government argues, the proper inference is that it would not be feasible for the Illuminating Company to divert (from rail to truck) coal purchases in those districts of a larger quantity (Motion, pp. 9-10)

But the Commission directly rejected any such inference as support for its finding when it said (Juris. St., App. B, p. 103):

> Coal production in the principal counties in the Leetonia and Middle districts rose from 3,649,461 tons in 1945 to 6,503,652 tons in 1953. Considering the indicated recoverable reserves in these districts, it is apparent that they could supply the Illuminating Company with substantial quantities of coal for many years.

The railroad appellees completely misconceived the substance of the point under consideration for they treat it as involving the substantiality of evidence, a question not raised by the appeal, rather than as involving the adequacy of findings, which is the question presented.

In asking the Court to hold that the order is not supported by necessary findings, appellants do not ask the Court to examine the evidence at all or to go back of the Commission's own findings. *The point is simply that the findings do not support the order.* The railroad appellees refer (Motion, p. 8) to the numbered paragraphs on pages 14-17 of appellant's Statement as to Jurisdiction as a "partial summarization of the evidence" relating to truck competition favorable to appellants' contentions. The numbered paragraphs referred to do not summarize the evidence at all, but do *summarize the Commission's own*

*findings on the subject of truck competition.* In Appendix A to their motion, the railroad appellees attempt to counteract these findings of the Commission by referring to certain evidence before the Commission. The trouble is that they can point to no findings of the Commission to support their contentions. Furthermore, the railroads are actually doing what they erroneously accuse appellants of doing. They are asking this Court to go back of the Commission's own findings and review evidence favorable to them which was never adopted in the findings of the Commission.

The long quotation from the opinion of the lower court (Motion of Railroad Appellees, pp. 7-8) does not in fact rule on the ground of invalidity on which appellants rely. While the lower court notes some of the evidence, its discussion does not treat directly with the adequacy of findings, the point on which appellants rely.

The importance of the question of rationalization and adequate support in the report for the finding which denies the existence of actual and potential intrastate truck competition as a differentiating circumstance, warrants the full consideration of this Court.

## IV.

Appellants' Jurisdictional Statement (pp. 18-19) deals adequately with the Government's claim that appellants' Question No. II, which deals with the failure of the Commission to make any finding as to potential truck competition, involves merely a play on words.

The railroad appellees urge that full consideration of potential truck competition is evidenced by the following

finding in the Commission's report (Juris. St., App. B, p. 109):

> On this record, we are not convinced that an increase in the intrastate rates to their former level would cause a diversion of traffic to the trucks to such an extent that the respondents would suffer a greater loss in revenue than would result from maintenance of the present rates.

The foregoing finding was not considered in appellants' Jurisdictional Statement since it purports to be directed to the matter of revenue discrimination, a matter not passed upon by the lower court. If, however, it should be treated as an extension into the future of the finding that existing truck competition is not of sufficient severity to constitute a differentiating circumstance under the issue of preference and prejudice, we need say only that it cannot be rationalized with what the Commission itself says concerning the evidentiary facts (Juris. St., pp. 14-17).

Furthermore, the quoted finding is not supported by but is inconsistent with the Commission's clear finding (Juris. St., App. B, p. 102) that a reduction of 44 cents on 3,423,755 tons of coal would have been offset by a diversion of 538,018 tons to trucks.

## V.

Appellants contend that, because of lack of findings, the Commission's decision conflicts with *United States* v. *Illinois Central*, 263 U.S. 515, which held that a "difference in rates cannot be held illegal [because unduly preferential and prejudicial] unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions." (Juris. St., Question No. IV, pp. 23-25). The Government (Motion p. 12) and

the railroad appellees (Motion pp. 16-17) say that this contention is answered by *Ohio* v. *United States*, 292 U.S. 498, in which this Court sustained the 1933 order of the Commission finding undue preference and prejudice as between the Ohio intrastate rates and the interstate rates in effect at that time. In that case, however, as appellants pointed out (Juris. St., pp. 23-24), the Commission met the test of *United States* v. *Illinois Central, supra* by finding that the intrastate rates were "generally substantially lower, distance considered" than the interstate rates and that "this disparity in rates is greater than is warranted by differences in transportation conditions." 292 U.S. at 504. There are no such findings here. That is what distinguishes the two cases.

The five findings referred to by the railroads (Motion, p. 17) are not sufficient to meet the requirements of *United States* v. *Illinois Central*, 263 U.S. 515, *supra*. Numbers (1), (2), and (5) are not pertinent to the issue of preference and prejudice but were made in support of the Commission's ultimate conclusion that the intrastate rates caused unjust revenue discrimination against interstate commerce, a matter not passed upon by the lower court. As has been pointed out, rates may cause preference and prejudice even though they are reasonable. Number (4) is the ultimate finding on preference and prejudice in the language of the statute which requires subsidiary findings to support it. Number (3) is the so-called historical relationship finding which, appellants say, is not of itself sufficient support—lacking compliance with the rule of *United States* v. *Illinois Central, supra*—for a finding of undue preference and prejudice.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal presents substantial questions which should be determined by the Court only after full consideration on the merits and after argument.

Respectfully submitted,

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No. 927. CLEVELAND ELECTRIC ILLUMINATING CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Ohio. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Nuel D. Belnap* and *Harold E. Spencer* for the Cleveland Electric Illuminating Co., and *C. F. Taplin, Jr.* for the Ohio Coal Association, appellants. *Solicitor General Rankin, Robert W. Ginnane* and *Samuel R. Howell* for the United States and the Interstate Commerce Commission, and *Howard F. Burns, R. B. Claytor, Hugh B. Cox, Anthony P. Donadio, John P. Fishwick, Richard J. Murphy, W. A. Wilkinson* and *Edward A. Kaier* for the Baltimore & Ohio Railroad Co. et al., appellees. Reported below: 147 F. Supp. 622.